No. 10783

United States
Circuit Court of Appeals
For the Ninth Circuit.

16

ELMER H. MATEAS,

Appellant,

vs.

FRED HARVEY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

Rotary Colorprint, 55 Eleventh Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

WALTER GOULD LINCOLN,

Suite 1113 Lincoln Bldg.,
Los Angeles, Calif.

For Appellee:

SCHELL & DELAMER,

Suite 1212, 215 W. 7th St.,
Los Angeles 14, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of California
In and for the County of Los Angeles

No. 485,744

ELMER H. MATEAS,

Plaintiff,

vs.

FRED HARVEY, a corporation, DOE No. 1; DOE No. 2; DOE, No. 3,

Defendants.

COMPLAINT FOR DAMAGES FOR PERSONAL INJURIES

Plaintiff complains of the defendant and alleges:

I.

That Fred Harvey, a corporation is now and was at all times mentioned herein, a corporation doing business in the State of California.

II.

That on or about June 17th, 1942, the plaintiff rented from the defendant a certain mule reported to be named "Chiggers" for the purpose of riding said mule in a party accompanied by a guide furnished by the defendant; that the said mule was selected by the defendant for the plaintiff.

That plaintiff had no knowledge of any of the peculiarities of the mule, and plaintiff was not accustomed to riding this said mule.

III.

That on the same day the Plaintiff did ride the said mule and the said mule did buck and jump and throw the plaintiff off, and the plaintiff [2] did strike the base of his spine upon the pavement and did receive a fracture of the right transverse process of the 12th dorsal vertebra.

IV.

That by reason of the same the Plaintiff did suffer continuous pain and discomfort at the small of his back and right hip. That such pain continues even to the present time.

V.

That by reason thereof he has been obliged to and has remained away from his work as a plastering contractor, and has been obliged to and has received hospitalization and the attention of physicians.

VI.

That by reason of the said injury to his spine and hip the plaintiff has been damaged in the sum of $5,000.00, and has paid, or been obligated to pay to said physicians the sum of $370.50; and has lost an additional sum of $1785.00 by reason of his absence from his work.

VII.

That no part of any of said sums has been paid, and the whole thereof is now unpaid to the Plaintiff.

Wherefore Plaintiff prays for judgment against the defendant in the sum of $7155.50, and interests and costs.

WALTER GOULD LINCOLN,
Attorney for Plaintiff. [3]

State of California,
County of Los Angeles—ss.

Elmer H. Mateas being by me first duly sworn deposes and says: that he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief; and as to those matters that he believes it to be true.

ELMER H. MATEAS.

Subscribed and sworn to before me this 26 day of May, 1943.

[Seal] G. M. PAULL,
Notary Public in and for the County of Los Angeles, State of California.
My Commission Expires June 22, 19 ...

[Endorsed]: Filed May 28, 1943. J. F. Moroney, County Clerk, By A. Ryan, Deputy.

[Endorsed]: Filed Oct. 1, 1943. Edmund L. Smith, Clerk, By John A. Childress, Deputy Clerk. [4]

[Title of Superior Court and Cause.]

NOTICE OF MOTION TO REMOVE TO FEDERAL COURT

To Plaintiff Above Named, and

To Walter Gould Lincoln, Esq., His Attorney:

You and Each of You Will Please Take Notice that Fred Harvey, a corporation, one of the defendants in the above entitled action, will on the 13th day of September, 1943, at the hour of 9:30 A. M., or as soon thereafter as counsel can be heard, move the above entitled court in Department 35 thereof, located on the 20th Floor, City Hall, Los Angeles, California, for its order removing said cause to the District Court of the United States for the Southern District of California, Central Division, in accordance with the petition and bond heretofore served and filed in said court by said defendant Fred Harvey, a corporation.

Dated at Los Angeles, California, this 2nd day of September, 1943.

SCHELL & DELAMER,
By GERALD F. H. DELAMER,
Attorneys for defendant Fred Harvey, a corporation. [5]

(Affidavit of Service by Mail.)

[Endorsed]: Filed Sept. 2, 1943. J. F. Moroney, County Clerk, By A. Ryan, Deputy.

[Endorsed]: Filed Oct. 1, 1943. Edmund L. Smith, Clerk, By John A. Childress, Deputy Clerk. [6]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL TO FEDERAL COURT

To the Honorable, the Superior Court of the State of California, in and for the County of Los Angeles:

The petition of Fred Harvey, a corporation, one of the defendants in the above entitled action, respectfully shows as follows:

I.

That petitioning defendant is a corporation organized and existing under the laws of the State of New Jersey, and at the time of the commencement of this action and ever since has been and still is a resident of and citizen of the State of New Jersey.

II.

That said cause is a civil action, to-wit, an action for damages on account of personal injuries alleged to have been sustained by the plaintiff, Elmer H. Mateas, as a result of being thrown from a mule rented to him by your petitioner.

III.

That the controversy involved in this action is between [7] citizens of the United States residing in different states of the United States, to-wit, between the plaintiff, Elmer H. Mateas, who resides in and is a citizen of the State of California, on the one hand, and the defendant, Fred Harvey, a corporation, who is a citizen of the State of New Jersey on the other hand.

IV.

That the matter in dispute in this action exceeds in value the sum of $3,000.00 exclusive of costs, as appears from the allegations of the complaint filed herein, which allegations are incorporated herein by reference with the same force and effect as if fully re-alleged and restated herein, for the purpose of showing the amount in controversy.

V.

That your petitioning defendant, Fred Harvey, a corporation, desires to remove said cause before the trial thereof into the District Court of the United States of America in and for the Southern District of California, Central Division.

VI.

That this petitioning defendant, Fred Harvey, a corporation, hereby presents a good and sufficient bond as provided by the statutes in such cases, that said petitioning defendant will enter into such District Court of the United States, within thirty days from the filing of this petition, a certified copy of the record in this suit and conditioned for the payment of all costs which may be awarded in this action by the said Court if the said District Court holds that said action was wrongfully and improperly removed thereto.

VII.

That this petitioning defendant was served with summons and complaint in the above entitled action in Los Angeles, County of Los Angeles, State of

California, on the 23rd day of August, 1943, and that said petitioning defendant's time to plead to said summons and complaint has not expired as of the date hereof. That no appearance in said action has heretofore been made by this petitioning defendant. [8]

VIII.

That your petitioner was the owner of the mule referred to in plaintiff's complaint at the time of the renting thereof to the plaintiff and at the time of the happening of the accident referred to in plaintiff's complaint, and that no other person had any right, title or interest in or to said mule or rented the same to the plaintiff.

IX.

That a separable controversy exists between the plaintiff and your petitioning defendant in connection with the alleged liability on the part of your petitioner as the result of the renting of said mule by your petitioner to the plaintiff.

X.

That your petitioner is informed and believes and upon such information and belief alleges that the defendants other than this petitioning defendant named in said complaint, to-wit, Doe No. 1, Doe No. 2, and Doe No. 3, and each of them, are not necessary or proper parties to this action, and that said fictitiously named defendants, and each of them, have been fraudulently joined as defendants in this action for the purpose of attempting to prevent a

removal of this cause to said United States District Court, and that your petitioner is informed and believes and therefore alleges that no service of summons or complaint has been attempted or has been had upon such fictitiously named defendants, or any of them.

Wherefore, said petitioning defendant prays that said Superior Court proceed no further herein except to make the order of removal of said cause, as required by law, from said Superior Court to said United States District Court, and to accept and approve the said statutory bond in connection therewith, which is herewith presented to said Superior Court, and to direct a transcript of the record herein to be made and certified by the Clerk of said Superior Court, as provided by law, and your petitioner will ever pray.

FRED HARVEY, a corporation,
By SCHELL & DELAMER,
By GERALD F. H. DELAMER,
Its Attorneys,
Petitioner. [9]

SCHELL & DELAMER,
By GERALD F. H. DELAMER,
Attorneys for petitioning defendant.

(Duly Verified by Gerald F. H. Delamer.) [10]

(Affidavit of Service by Mail.)

[Endorsed]: Filed Sept. 2, 1943. J. F. Moroney, County Clerk, By A. Ryan, Deputy.

[Endorsed]: Filed Oct. 1, 1943. Edmund L. Smith, Clerk, By John A. Childress, Deputy Clerk.

[11]

[Title of Superior Court and Cause.]

BOND ON REMOVAL

Know All Men by These Presents, That Indemnity Insurance Company of North America, a corporation organized and existing under the laws of the State of Pennsylvania, and duly qualified to transact a general surety business in the State of California, is held and firmly bound unto Elmer H. Mateas, in the sum of Five Hundred ($500.00) Dollars, lawful money of the United States of America, for which payment well and truly to be made it binds itself, its successors and assigns, jointly and severally, firmly by these presents.

The Condition of the Above Obligation Is Such That,

Whereas, the Defendant in the above entitled action has filed its petition in the Superior Court of the State of California in and for the County of Los Angeles, for the removal of said action now pending therein to the District Court of the United States, Southern District of California, Central Division,

Now, Therefore, if the said Fred Harvey, a corporation, shall enter in the District Court of the United States for the Southern District of California, Central Division within thirty (30) days from the date of filing said petition, a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded there- [12] in by said District Court of the United States for the Southern District of California, Central Division if

said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise to remain in full force and virtue.

Signed, sealed and dated this 2nd day of September, 1943.

[Seal] INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,
By E. F. HOLMES,
Attorney in Fact.

The foregoing bond is hereby approved as to form and sufficiency of Surety this 3rd day of September, 1943.

H. C. SHEPHERD,
Court Commissioner of Los Angeles County.

Bond Approved Sept. 13, 1943.
ALFRED L. BARTLETT,
Judge.

State of California,
County of Los Angeles—ss.

On this 2 day of September in the year one thousand nine hundred and forty three before me F. D. Lanctot, a Notary Public in and for the County of Los Angeles personally appeared E. F. Holmes known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the Indemnity Insurance Company of North America, and acknowledged to me that he sub-

scribed the name of the Indemnity Insurance Company of North America thereto as principal, and his own name, as Attorney-in-fact.

[Seal] F. D. LANCTOT,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires 8-24-47.

The Premium Charged for this Bond is $10.00 for the term thereof.

[Endorsed]: Filed Sept. 2, 1943. J. F. Moroney, Couty Clerk, By A. Ryan, Deputy.

[Endorsed]: Filed Oct. 1, 1943. Edmund L. Smith, Clerk, By John A. Childress, Deputy Clerk.

[13]

In the Superior Court of the State of California
In and for the County of Los Angeles

Honorable Alfred L. Bartlett, Judge Presiding; Department No. 35, September 13, 1943.

No. 485744

[Title of Cause.]

(Entered September 16, 1943.)

Petition and Bond of Defendant Fred Harvey, a Corporation, for removal to the United States District Court, Southern District, Central Division, and Demurrer of same Defendant to Complaint come on for hearing; Schell and Delamer by S. McHaffie appearing as attorney for Defendant named.

Petition is granted; Bond approved. Said Demurrer is ordered off calendar.

[Endorsed]: Filed Oct. 1, 1943. Edmund L. Smith, Clerk, By John A. Childress, Deputy Clerk. [14]

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL

This cause coming on for hearing upon petition and bond of Fred Harvey, a corporation, one of the defendants herein, for an order transferring this cause to the District Court of the United States for the Southern District of California, Central Division, and it appearing to the court that the said defendant has filed its petition for such removal in due form of law and that said defendant has filed its bond duly conditioned with good and sufficient sureties as provided by law, and that said defendant has given the plaintiff due and legal notice thereon and it appearing to the court that this is a proper cause for removal to said District Court, said petition and bond are hereby accepted and approved, and

It Is Hereby Ordered And Adjudged that this cause be and it is hereby removed to the United States District Court for the Southern District of California, Central Division, and that the Clerk is hereby directed to make up and certify the record in said cause for transmission to said court forthwith.

Done in open court this 13th day of September, 1943.

ALFRED L. BARTLETT
Judge.

[Endorsed]: Filed Sep. 13, 1943. J. F. Moroney, County Clerk. By J. D. John, Deputy.

[Endorsed]: Filed Oct 1, 1943. Edmund L. Smith, Clerk. By John A. Childress, Deputy Clerk.

[15]

CERTIFICATE OF CLERK OF SUPERIOR COURT

State of California,
County of Los Angeles—ss.

No. 485744

I. J. F. Moroney, County Clerk and Clerk of the Superior Court in and for the County and State aforesaid, do hereby certify the foregoing copies of documents consisting of the

Complaint, Demurrer, Notice of hearing petition for removal, Petition for Removal, Bond on Removal, Minute Order of September 13, 1943 granting petition for removal, and written Order for Removal to the District Court of the United States for the Southern District of California (Central Division), in the action of

Elmer H. Mateas vs. Fred Harvey, a corporation, et al., to be a full, true and correct copy, of all of

the original documents on file and/or of record in this office in the above-entitled action to and including the date the motion was granted for Removal to the District Court of the United States, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 1st day of October, 1943.

(Seal) J. F. MORONEY,

County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles,

(By) M. B. WARD,
Deputy

[Endorsed): Filed Oct. 1, 1943. Edmund L. Smith, Clerk. By John A. Childress, Deputy Clerk.

[16]

District Court of the United States for the Southern District of California, Central Division.

No. 3179-Y Civ.

ELMER H. MATEAS,

Plaintiff,

vs.

FRED HARVEY, a corporation, et al.,

Defendants.

AMENDED COMPLAINT

Leave of Court having been granted, Plaintiff hereby amends his complaint and alleges:

I.

That the Fred Harvey, a corporation, is now and was at all times herein mentioned, a corporation organized and esisting under the laws of the State of New Jersey, and doing business in the States of Arizona and California.

II.

That the Grand Canyon of the Colorado is in the State of Arizona aforesaid, and at and on a portion of the south rim of the said Canyon, the said defendant corporation has now, and has maintained, operated and owned for at least five years last past and immediately prior to the beginning of this action, an all year round resort, known as El Tovar.

III.

That the Colorado River runs in a general easterly and westerly direction at the base of the said south Rim, which is about a mile [17] above the surface of the said river; that as one of the attractions and inducements to the excursionist to patronise the said El Tovar the said defendant corporation has owned, operated and maintained for the same period of time two trails leading from the said south rim to the said river, one known as the Phantom Ranch Trail and the other known as the "Bright Angel Trail".

That the said "Bright Angel Trail" is about six miles in length, and very tortuous and steep, with many sharp turns and narrow pathways, all of which conditions were well known to defendant corporation on June 17th, 1942 but unknown to the Plaintiff herein.

IV.

That during the said entire period the said defendant corporation has maintained a string of mules on each of said trails for the purposes of

(1) On the Phanton Ranch Trail, to carry supplies to and across the said Colorado River to a vacationing resort known as "Phanton Ranch";

(2) For the purpose of carrying excursionists —one to a mule—on the said "Bright Angel Trail" in order to go from El Tovar down to the Colorado River, and return.

That the Phanton Ranch string of mules has always been composed of pack mules only, carrying no persons; that the Bright Angel Trail mules do

not carry any packs, except a small amount which may be necessary to carry lunches for said excursionists, but, on the contrary the mules provides for service on such trail, are used exculsively by persons, male and female, to ride down and up, as heretofore set forth, accompanied by a guide selected by defendant corporation, and that for such experience, excursion, and ride each of said persons pays a fee to the defendant corporation, which fee has been established by it.

That the Plaintiff is informed and believes and therefore alleges that the pack mules so used on the Phantom Ranch Trail are used on that trail for a period of two years, and then are transferred to the "Bright Angel Trail". [18]

That on or about June 17, 1942, the Plaintiff, desiring to compose one of a party who would make the Bright Angel *Trial* trip, personally presented himself to defendant corporation, and paid in advance to defendant corporation the required fee so established for such excursion, or trip. That at said time and place a string of mules was pro*f*ided for the use of the plaintiff and the various other persons who were in the party to take, *and who were in the party to take,* and who did take, said trip and said excursion, and such string of mules was presided over and guided by Bob Ennis, who had such mules under his sole control, charge and management.

VI.

That the said Bob Ennis was at such time and place an employee of said defendant corporation and acting within the scope of his employment. That he had been in such employment, as plaintiff is informed and believes and therefore alleges, for a period of at least five or six years continuously, and immediately prior to, and on said date in 1942. That during that entire period he also had charge of, and control and management of, all the mules used on both of said trails.

Plaintiff is informed and believes and therefore alleges that one of said mules so presented by defendant corporation for the use of said excursionists on said trip in July, 1942, was named "Chigger" or "Jigger" and that this occasion was the first time that this mule had ever been down, or up the "Bright Angel Trail" and was the first time the said mule had been down, or up said trail in the year 1942, and was the first time said mule had carried any excursionist on his back.

That plaintiff is informed and believes and therefore alleges, that previous to said July 17, 1942, the said mule had been by defendant corporation used exclusively for a period of approximately two years on the pack train going from said north rim on the Phantom Ranch Trail, and that said mule had not during that period carried persons, but always carried a pack, or merchandise of some character, or description. [19]

That said mule was not accustomed to carrying persons, or any person.

VII.

That none of the facts alleged in the immediately foregoing paragraphs Nos. *1, 4,* and VI were known to this plaintiff, nor was the plaintiff informed of any of such conditions prior to the time of the injury complained of.

VIII.

That at the said time and place the plaintiff did informe said defendant corporation that he had never been down the Bright Angel Trail before; had never ridden a mule, was not an experienced rider either of horses or mules, and he desired a suitable, safe and fit animal be selected for him by the guide. That said guide did select such animal, namely, the mule named "Jiggers" or "Chiggers" and placed said mule as the last one in the string. That plaintiff had not seen any of said mules before said June 17, 1942.

IX.

That defendant corporation then and there well knew, or should have known that the said mule was not at all suitable, or fit to be used for the purpose for which it was provided, and was not a safe mule to be ridden in such place under such circumstances and conditions, and by a person wholly unfamiliar with riding either horse or mule.

X.

That when the said party of excursionists (comprising the plaintiff among them, seated upon the mule "Chiggers" and being the last person in the

string of such mules) on said June 17, 1942, reached a place on the said "Bright Angel Trail" about 5 miles below the said north rim, the said mule, without any act or thing done upon the part of the plaintiff, did suddenly buck and jump and did throw the plaintiff from his back, and did throw the plaintiff off, and the plaintiff was thrown off and did fall upon his back upon the roadway, where he lay for a period of four hours before any assistance was brought to him.

That as a result of the said fall the Plaintiff did receive a fracture of the right transverse process of the 12th dorsal vertibra. [20]

XI.

That by reason of the same the Plaintiff did suffer continuous pain and discomfort at the small of his back and right hip. That such pain continues even to the present time.

XII.

That by reason thereof he has been obliged to and has remained away from his work as a plastering contractor, and has been obliged to and has received hospitalization and the attention of physicians.

XIII.

That by reason of the said injury to his spine and hip the plaintiff has been damaged in the sum of Five Thousand Dollars ($5,000.00) and has paid, or been obliged to pay to said physician the sum of Three Hundred and Seventy Dollars /50c, and has lost an additional sum of Seventeen Hundred

and Eighty five Dollars ($1,785.00) by reason of his absence from his work.

XIV.

That no part of any of said sums has been paid and the whole thereof is now unpaid to the Plaintiff.

Wherefore Plaintiff prays for judgment against the defendant in the sum of Seven Thousand One Hundred and Fifty Five Dollars and fifty cents ($1,155.50) and interests and costs.

WALTER GOULD LINCOLN,
Attorney for Plaintiff. [21]

State of California,
County of Los Angeles—ss.

Elmer H. Mateas being by me first duly sworn, deposes and says that he is the Plaintiff in the above entitled action; that he has read the foregoing amended complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief; and as to these matters that he believes it to be true.

ELMER H. MATEAS

Subscribed and sworn to before me this 30 day of December, 1943.

[Seal] F. E. WEATHERHOLT,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Dec. 31, 1943. Edmund L. Smith, Clerk, by John A. Childress, Deputy Clerk. [22]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes Now Defendant Fred Harvey, a corporation, and answering plaintiff's amended complaint for itself alone, and as a first defense thereto, admits, denies and alleges as follows:

I.

Alleges that said amended complaint, nor any part nor paragraph thereof, fails to and does not state a claim upon which relief can be granted to the plaintiff.

And As a Second Separate and Distinct Defense Thereto, This Answering Defendant Admits, Alleges and Denies As Follows:

I.

Answering paragraph IV, this answering defendant admits that at the time mentioned in plaintiff's amended complaint, this answering defendant maintained mules for the purpose of carrying persons and property in certain portions of the country generally known as the Grand Canyon of the Colorado, and said mules were used on the Phanton Ranch Trail and on the Bright Angel Trail, and this defendant charged a fee to persons riding said mules, but except as herein expressly [23] admitted denies each and all and every of the remaining allegations of said paragraph IV.

II.

Answering paragraph V, this answering defendant admits that Bob Ennis was the guide furnished by this answering defendant for said trip taken by plaintiff and others, but denies that the mules so used on said trip, except the mule ridden by said Bob Ennis, were under the sole control, charge and management of said Bob Ennis, but on the contrary alleges the fact to be that the mules were under the immediate control, charge and management of their respective riders.

III.

Denies generally and specifically the allegations of paragraph VI beginning with the word "That," on line 14, page 3, to and including the end of that paragraph.

IV.

Answering paragraph VII, this answering defendant denies the allegations of paragraphs numbered *1, 4* and VI, as attempted to be incorporated by reference in paragraph VII, except in so far as said statements contained in said paragraphs have been expressly admitted by this answering defendant.

V.

Denies generally and specifically each and all and every of the allegations contained in paragraph IX.

VI.

Answering paragraph X, this answering defendant admits that plaintiff fell from said mule upon

said Bright Angel Trail, but except as herein expressly admitted this answering defendant has no information or belief sufficient to enable it to answer the remaining allegations, and basing its denial on that ground denies each and all and every of the remaining allegations of said paragraph X.

VII.

This answering defendant does not have sufficient information or belief to enable it to answer the allegations of paragraphs XI, XII and XIII, and basing its denial on that ground denies each and all and every of the allegations contained in said paragraphs, and denies that plaintiff has been damaged in the sum of $5,000.00, or any other sum or at all, or the sum of $370.50 or any other sum or at all on account [24] of physicians services, or the sum of $1785.00, or any other sum or at all by reason of loss of earnings.

VIII.

Answering paragraph XIV, this answering defendant admits that it has not paid any of the sums mentioned in paragraph XIII of plaintiff's amended complaint, but denies that the whole or any part thereof is now due from this answering defendant to plaintiff, and denies that this answering defendant is indebted to plaintiff in any sum whatsoever.

IX.

Denies any liability upon the part of this answering defendant by reason of any matters set forth in plaintiff's amended complaint.

And as a Third, Separate and Distinct Defense Thereto, This Answering Defendant Admits, Alleges and Denies as Follows:

I.

That the accident referred to in plaintiff's amended complaint was an inevitable and unavoidable accident in so far as this answering defendant is concerned.

And as a Fourth, Separate and Distinct Defense Thereto, This Answering Defendant Admits, Alleges and Denies as Follows:

I.

That in riding said mule referred to in plaintiff's amended complaint, immediately prior to and up to the time of the happening of the accident referred to in plaintiff's amended complaint, the plaintiff himself had voluntarily assumed any risk to the riding of said mule.

Wherefore, this answering defendant prays that plaintiff take nothing, and that it be dismissed hence with its costs of suit incurred, and for such other and further relief as to the court may seem just.

SCHELL & DELAMER,
By W. O. SCHELL,
A member of the firm,
Attorneys for Fred Harvey,
a corporation.

Office & P. O. Address: Suite 1212, 215 W. 7th Street, Los Angeles 14, California.

[Endorsed]: Filed Jan. 7, 1944. [25]

At a stated term, to-wit: The September Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 18th day of January in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable: Leon R. Yankwich, District Judge.

[Title of Cause.]

No. 3179-Y Civil

TRIAL

This cause coming on for trial; Walter Gould Lincoln, Esq., appearing as counsel for plaintiff; W. O. Schell, Esq., appearing as counsel for defendant; John Q. Bybee, Court Reporter, being present and reporting the proceedings:

Emmett Myron Ennis is called, sworn, and testifies for plaintiff. Plaintiff's Exhibits Nos. 1 and 2 are marked for identification, and No. 3 is admitted into evidence. Said witness testifies further.

Elmer Mateas is called, sworn, and testifies for plaintiff. Plaintiff's Exhibit No. 4 is admitted into evidence. Plaintiff's Exhibit 1 for identification is offered and received in evidence and is marked Plaintiff's Exhibit No. 1. Plaintiff's Exhibit No. 5 is admitted into evidence.

June Mateas is called, sworn, and testifies for plaintiff.

At 12 o'clock noon Court recesses to 1:30 P. M. Court reconvenes at 1:50 P. M. appearances as before.

Leigh E. Sloan is called, sworn, and testifies for plaintiff. Plaintiff's Exhibit No. 6 is admitted into evidence. Said witness Sloan testifies further on cross examination. Plaintiff's Exhibits Nos. 7 and 6-A are marked in evidence and for identification, respectively.

June Mateas resumes the stand and testifies further.

Alice Rayle is called, sworn, and testifies for plaintiff. [26]

Emmet Myron Ennis is recalled and testifies further for plaintiff.

John Bradley is called, sworn, and testifies for plaintiff.

Ella W. Vogel is called, sworn, and testifies for plaintiff.

Plaintiff rests.

Defendant moves for non-suit and moves to dismiss.

Attorney Lincoln suggests plaintiff be allowed to amend to conform to proof.

Motion to dismiss is granted. Counsel for defendant will draw judgment. [27]

District Court of the United States for the Southern District of California, Central Division.

No. 3179-Y Civ.

ELMER H. MATEAS,

Plaintiff,

vs.

FRED HARVEY, a corporation, et al.,

Defendants.

JUDGMENT OF DISMISSAL

The above entitled matter having come on regularly for trial on the 18th day of January, 1944, before the Honorable Leon R. Yankwich, Judge presiding, sitting without a jury, a jury having been *been* expressly waived, plaintiff being present in person and represented by his attorney Walter Gould Lincoln, Esq., defendant Fred Harvey, a corporation, being represented by its attorneys Schell & Delamer, by W. O. Schell, Esq., and evidence both oral and documentary having been introduced, and plaintiff having rested his case, and defendant having moved for a dismissal of the action on the ground that the evidence failed to show facts on which relief could be granted, and the Court being fully advised in the premises, and it appearing to the Court that said motion should be granted, and the Court having granted said motion:

Now, Therefore, it is Ordered, Adjudged and

Decreed that the above entitled action be and the same is hereby dismissed, defendant to have and recover its costs herein incurred. [28]

Dated: January 31, 1944.

Taxed at $113.91

LEON R. YANKWICH,
Judge

Approved as to form this 26 day of January, 1944.

WALTER GOULD LINCOLN
Attorney for Plaintiff.

Approved as to form this 26 day of January, 1944.

SCHELL & DELAMER
By W. O. SCHELL
Attorney for defendant Fred Harvey, a corporation.

Judgment entered Jan. 31, 1944, docketed Jan. 31, 1944, C. O. Book 23, Page 174. Edmund L. Smith, Clerk, By Louis J. Somers, Deputy.

[Endorsed]: Filed Jan. 31, 1944. [29]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that the Plaintiff, Elmer H. Mateas, in the above entitled action, hereby Appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment

entered in this action on the 31 day of January, 1944.

WALTER GOULD LINCOLN
Attorney for Appellant.

[Endorsed]: Filed Mailed copy of Notice of Appeal & bond to Schell & Delamer, Attys., for deft Fred Harvey, a corp. Apr. 17, 1944, Edmund L. Smith, Clerk, By John A. Childress, Deputy Clerk. [30]

[Title of District Court ond Cause.]

BOND FOR COSTS ON APPEAL

Whereas the Plaintiff in the above entitled action is about to Appeal to the United States Circuit Court of Appeals for the Ninth *District* from a judgment rendered against him in the said action in the District Court of the United States for the Southern District of California, Central Division;

Now Therefore, in consideration of the premises, and of such appeal, we, the undersigned residents of the County of Los Angeles, State of California, do hereby jointly and severally undertake and promise, on the part of said Appellant, that the said Appellant will pay all costs which may be awarded against him if the said Appeal is dismissed, or the judgment affirmed, or all such costs as the Appellate Court may award if the judgment is modified, not to exceed $250.00, to which amount

we acknowledge ourselves jointly and severally bound.

JACK MATEAS
EVA MATEAS
CHARLIE PARGE
ANNIE PARGE [31]

State of California,
County of Los Angeles—ss.

Jack Mateas, Eva Mateas, Charles Parge and Annie Parge each for himself deposes and says:

That he is one of the sureties whose name is subscribed to the within undertaking; that he is a resident and free-holder of the State of California, and is worth the sum in the undertaking specified, over and above all his just debts and liabilities, exclusive of property exempt from execution.

JACK MATEAS
EVA MATEAS
CHARLIE PARGE
ANNIE PARGE

Sworn and subscribed to before me this 14 day of April, 1944.

[Seal] F. E. WEATHERHOLT
Notary Public in and for said County and State.

[Endorsed]: Filed April 17, 1944. [32]

[Title of District Court and Cause.]

NOTICE OF DESIGNATION OF PAPERS TO BE USED ON APPEAL

To: The Defendant and to their attorneys, Messrs. Schell & Delamer.

You and each of you will please take notice that the Plaintiff Elmer H. Mateas, Appe*l*ant herein, designates the following papers as being those upon which he will rely on appeal, to wit:

Removal Papers;
Amended Complaint;
Answer Thereto;
Minute Order of January 18, 1944;
Judgment;
Notice of Appeal; Bond on Appeal;
Reporters Transcript;
All Plaintiff's Exhibits.

The above constitute the entire record on appeal.

WALTER GOULD LINCOLN
Attorney for Appellant.

Received copy of the within Notice of Designation this 17 day of April, 1944.

SCHELL & DELAMER
Attorney for Defendant

[Endorsed]: Filed April 18, 1944. [33]

[Title of District Court and Cause.]

ORDER FOR TRANSFER OF ORIGINAL EXHIBITS

It is Hereby Ordered that the original exhibits now on file in the above entitled matter need not be copied, but may be transferred in their original state to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: Los Angeles, California, May 23rd, 1944.

PAUL J. McCORMICK
Judge.

[Endorsed]: Filed May 23, 1944. [34]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 34 inclusive contain full, true and correct copies of: Complaint for Damages for Personal Injuries; Notice of Motion to Remove to Federal Court; Petition for Removal to Federal Court; Bond on Removal; Minute Order (Superior Court) Entered September 16, 1943; Order for Removal; Certificate of Clerk of Superior Court; Amended Complaint; Answer to Amended Complaint; Minute Order Entered January 18, 1944; Judgment of Dismissal; Notice of Appeal;

Bond for Costs on Appeal; Notice of Designation of Papers to be Used on Appeal and Order for Transfer of Original Exhibits which, together with the Reporter's Transcript and Original Exhibits transmitted herewith, constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $13.85 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 24 day of May, 1944.

[Seal] EDMUND L. SMITH, Clerk

By THEODORE HOCKE

Deputy Clerk

REPORTER'S TRANSCRIPT OF TESTIMONY AND PROCEEDINGS ON TRIAL

Appearances:

Walter Gould Lincoln, Esq.,
For plaintiff.

Messers. Schell & Delamer,
by Walter O. Schell, Esq.,
For defendant.

Hon. Leon R. Yankwich, Judge Presiding.

Los Angeles, California,
Tuesday, January 18, 1944,
10 A.M.

The Court: Are there any ex parte matters this morning? Calendar matters.

The Clerk: 3179-Civil-Elmer H. Mateas against Fred Harvey, a corporation.

Mr. Schell: Ready for the defendant.

Mr. Lincoln: The plaintiff is ready.

The Court: All right. Proceed.

Mr. Lincoln: Your Honor has read the pleadings, I take it?

The Court: Yes, I have. If you want to make an opening statement it is all right.

Mr. Lincoln: No, I don't care to so long as you have read the pleadings, that is quite sufficient.

The Court: I have read the pleadings.

Mr. Lincoln: Mr. Ennis, will you come forward, please? [2*]

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* Page numbering appearing at top of page of original Reporter's Transcript.

EMMET MYRON ENNIS,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Emmet Myron Ennis.

Direct Examination

Q. By Mr. Lincoln: Mr. Ennis, what is your occupation?

A. I am assistant manager of Fred Harvey Transportation Company at the Grand Canyon.

Q. And how long have you been in such occupation?

A. Well, I went to work for the company first in 1907, I worked there up until 1915, went to the army and come back in 1921.

Q. Since 1921 up to the present time you have still been working for them?

A. Been working for them; yes, sir.

Mr. Lincoln: I wonder, your Honor, if the court is familiar with the vicinity of El Tovar Hotel, and the trails there. Might we say if the court was we might not have to go into an explanation.

The Court: I don't know. For the record, I don't take judicial notice of things like that. Put it in the record. Describe it so you will have a record. So make your record. [3]

Q. By Mr. Lincoln: What are your particular duties in that office that you hold, Mr. Ennis?

A. Well, I am charged with all transportation,

(Testimony of Emmet Myron Ennis.)

both automobiles, buses, mules, stages to Williams and camps, and supervision of Phantom Ranch.

Q. The Harvey Company which you speak of, does that operate any hotels or places, or restaurants, or reserves, of any kind on the south rim of the Grand Canyon in Arizona? A. It does.

Q. Is there a hotel known as "El Tovar"?

A. There is.

Q. And that is one of the Harvey Company's places, is it, on the south rim? A. It is.

Q. That has been built about how long?

A. Well, the hotel was erected I believe in 1904.

Q. You spoke about some mules being a portion of your transportation problems. What are those mules used for?

A. Sight-seeing into the Canyon, packing, taking people down to the river.

Q. About how high is the south rim from the river itself? A. About 4800 feet.

Q. Are there other trails that go from the south rim to the river? A. There is. [4]

Q. How many? I mean, now, in the vicinity of El Tovar.

A. There is the "Bright Angel", which starts immediately west of the El Tovar, and there is what is known as the "Kaibib" Trail, and the "Yankee", which is east three miles.

Q. That latter one is about three miles east?

A. Three and one-half miles east.

Q. Does that also go to the Phantom Ranch?

A. Yes, sir.

(Testimony of Emmet Myron Ennis.)

Q. And the Phantom Ranch is located where?

A. Near the bottom of the Grand Canyon on the banks of Bright Angel Creek.

Q. Is that across the Colorado River?

A. It is.

Q. The Colorado River, of course, being in the bottom of the Canyon? A. Correct.

Q. Does that Kaibib Trail also go up on the other side of the Canyon?

A. Out on the north rim.

Q. And on the north rim is there another river similar to the one on the south rim; is that right?

A. There is, yes.

Q. The Bright Angel Trail which you speak of, is that a perfectly straight trail going straight down, or what is its construction? [5]

A. Well, it follows the contours of the Canyon where it was possible to make a trail; it is impossible to make a trail straight down.

Q. About how long in miles is the Bright Angel Trail from the south rim; that is, approximately? At approximately the El Tovar to the base of the Canyon? A. To the river?

Q. To the river, yes. A. Eight miles.

Q. How wide a trail is that?

A. Well, it varies in places from four to five or six feet.

Q. These pack trains which you spoke of, those are pack trains of mules, are they?

A. Yes, sir.

Q. And what do they pack?

(Testimony of Emmet Myron Ennis.)

A. Pack anything; goes down to the Canyon, and camp or lodge.

Q. To the Phantom Ranch? A. Yes.

Q. That is also maintained by the Harvey Company? A. It is.

Q. Who selects the mules for use in the pack trains, or the passenger trains?

A. I don't quite understand the question.

Q. Who selects the mules? [6]

A. What do you mean? When they are purchased and brought to camp?

Q. Yes, when purchased originally?

A. The mules for the last twenty-five years have been purchased by J. E. Shirley, manager of the Transportation Company.

Q. He is not here today, is he? A. No, sir.

Q. After those mules are purchased do they have any training period? A. They do.

Q. What does that consist of?

A. First they are put on a pack train and broke to pack a load, and halter broke, and the guides that runs the pack trains will take them down the trail and ride them part of the way back up the trail; that is the way our mules are trained.

Q. Now, do they go first on the Kaibib Trail?

A. The first—well, not necessarily—that happens to be that is where the bulk of the packing is, on the Kaibib Trail.

Q. So that they would naturally, perhaps, go there first to become accustomed to packing and going up and down; is that right?

(Testimony of Emmet Myron Ennis.)

A. Well, yes.

Q. And then you do pack up and down, as I understand [7] you, to the Phantom Ranch?

A. That is right.

Q. Of course, not so much as you do the Kaibib?

A. Well, we reach the Kaibib—Phantom, also, from the Kaibib Trail, which is the shortest trail to Phantom Ranch.

Q. I see. How long a training period do these mules have on the packing before you use them for passengers?

A. That depend upon the disposition of the mule.

Q. Ordinarily?

A. Well, anywhere from a year to two years.

Q. Mules do have different dispositions, as well as horses or people, don't they? A. Correct.

Q. Is the disposition of these mules determined by any one particular person in your outfit?

A. The disposition of the mules is generally determined by the packer, in conjunction with the trail foreman.

Q. Who was the packer on the Kaibib Trail in 1942? A. "Shorty" Yarberry.

Q. "Shorty" Yarberry? A. Yes.

Q. Did he also pack on the Phantom Ranch trail? A. That is where he was packing.

Q. What?

A. On the Kaibib Trail, too, the Kaibib Trail to [8] Phantom.

(Testimony of Emmet Myron Ennis.)

Q. I see. Pardon me. Do you have any packing to the Phantom Ranch by the Bright Angel Trial? A. We do, now; yes, sir.

Q. But you didn't in 1942?

A. We did in the winter of 1942, or the early spring.

Q. And previous to 1942?

A. Practically every winter and spring our pack, where we only run one pack train a week to Phantom Ranch to get their supplies up, is taken down the Bright Angel Trail and back out.

Q. Has the Harvey Company for some period of years carried passengers down the Bright Angel Trail to the Phantom Ranch and back?

A. Yes, there is the Bright Angel Trail and the Kaibib Trail is connected with what is called the "River Trail", and before the war we used the Kaibib Trail to Phantom Ranch, returning to the south rim of the Bright Angel Trail, making a loop trip.

Q. Well, what was the situation in 1942?

A. Kaibib Trail was closed to taking "dudes" to Phantom Ranch; we were using the Bright Angel Trail going and returning to save manpower.

Q. When did they close the Kaibib Trail?

A. June, 1942, when the Federal Government froze sight-seeing by automobiles. [9]

Q. Are these persons who go down the Bright Angel Trail, these people are sight-seers, strangers? Did you use the expression "dudes"?

(Testimony of Emmet Myron Ennis.)

A. We call them dudes."

Q. I see. As distinguished from cattlemen or cowboys?

A. Any cowman or cowboy that comes there and hires a mule to go down to the bottom of the Canyon, he is a "dude" to us.

Q. Are the mules which are to be used upon this trip, which the "dudes" take, kept in any particular place?

A. They are kept in the barns or, you might say, at the head of the trails. That is where all our activities start from, from the barns themselves.

Q. And those are mules which have been trained previously on the Phantom Ranch trips?

A. They have been trained on either trail.

Q. On either trail?

A. They were packing on both trails.

Q. Do you have any specific number of persons that you take down on the trip, or does that depend on the number of people that want to take a trip?

A. We limit the party to ten people. If it is one person to go, one guide will take him; if ten is to go, he will take ten; if there is eleven to go, it is two parties; one guide handles ten people. [10]

Q. Have you taken people down the Bright Angel Trail? A. Not in late years, no.

Q. Since how long?

A. Well, 1915, outside of special friends I take down there.

(Testimony of Emmet Myron Ennis.)

Q. Do you have a son by the name of Bob Ennis? A. I do.

Q. What was his occupation in 1942?

A. He was a guide.

Q. Taking people down the Bright Angel Trail?

A. The Bright Angel Trail.

Q. And how old was he at that time?

A. 18 years old.

Q. How long had he been familiar with mules or horses?

A. The first time I took Bob into the Canyon he was three years old, and I put him on a mule and he looked back and says, "Dad, I am your guide," and he has been riding ever since.

Q. Been handling mules or horses ever since?

A. Yes, sir.

Q. When a party is taken down the trail what location does the guide have; that is, is he first, or last, or in the middle, or where?

A. He is always in the lead.

Q. Is there any particular person who selects the particular mule any one person shall ride? [11]

A. No. The trail foreman and the guides generally ask—size the people up, and if they get pretty close to their weight, or they look like they are pretty heavy, they will ask what the weight is, and put them on the mule according to weight.

Q. Is that the only way the mules are selected for particular persons or passengers?

A. Yes, sir, because the trail foreman and the

(Testimony of Emmet Myron Ennis.)

guides know what weight a mule will handle and go into the Canyon and bring them back out.

Q. I see. And then each trip will have different weights or mules to accommodate different weights of "dudes"; would that be right?

A. Well, they try to see what mules—yes—the weight of the individual mule doesn't count; some of the biggest mules won't handle the big loads out of there.

Q. Now, Mr. Ennis, I am showing you what appears to be a circular headed "Grand Canyon, National Park, Arizona." Did you ever see a circular like that before? A. I have.

Q. And on the inside of it is a picture entitled "Going Down The Trail." Does that look like anything which you have ever seen before?

A. I have to get my eyes; old age is creeping up on me. Yes.

Q. And where would you say that was representing? [12]

A. That is going down on the Kaibib Trail.

Q. The Kaibib? A. Yes.

Mr. Lincoln: We offer this for identification only at this time, your Honor.

The Court: Very well.

Mr. Schell: I have not objected. I don't quite see the materiality of all this.

The Court: It is offered only for identification; therefore, there is nothing at the present to worry about until they offer it in evidence.

(Testimony of Emmet Myron Ennis.)

Q. By Mr. Lincoln: I show you another, what seems to be another circular, Mr. Ennis. The first circular I had was printed in blue and this one seems to have a reddish tinge to it, and did you ever see a circular like this one before?

A. Yes, sir.

Q. And I also call your attention to several pictures here of persons on horseback, either horseback or muleback. Will you tell me, please, if you recognize those pictures as being any portion of those trails which we have been speaking of?

A. This is taken from the top. It is nowhere near the Bright Angel Trail.

Q. Referring to a picture which is underneath a map, the map headed "Entrances Around The Grand Canyon," one [13] entitled "Heading Down Kaibib Trail To Phantom Ranch." This is also a picture of a portion of the Kaibib, is it?

A. That is right.

The Clerk: Exhibit 1 for identification.

Mr. Lincoln: We offer this, also, for identification, your Honor.

The Clerk: Exhibit 2 for identification.

Q. By Mr. Lincoln: I show you what seems to be a little circular presumably printed by the United States Department of the Interior, headed on the outside "Grand Canyon, National Park, Arizona," and call your attention particularly to a map on page 9 of that circular headed "Map of the South Rim." Will you tell me, please, would you be good enough to look at that, and tell me,

(Testimony of Emmet Myron Ennis.)

please, if you recognize that as being a fairly accurate map of that vicinity?

A. Yes, that is a correct map. I don't think it is a tour, or anything like that, but it is just a general guide that the Park Service puts out for the information of the "dudes" as they drive into the Canyon.

Mr. Lincoln: We will offer this, your Honor. I am only offering, the court will understand, at this time page 9, not the balance of the circular, in evidence.

The Clerk: 3 in evidence.

Mr. Lincoln: That is all, Mr. Ennis. [14]

Cross Examination

Q. By Mr. Schell: Mr. Ennis, as I understand it, these mules, when they come to the Harvey Company, are mules—both pack on both trails; that is, the Kaibib and the Bright Angel?

A. That is right.

Q. And sometimes down and up one and sometimes the other?

A. These pack trains go wherever they are required to go. Now, the Santa Fe Railroad maintains a pumping station at the Indian Gardens, which is three and a half miles down the Bright Angel, and they require and get all the packs down there so they are working on either trail.

Q. And then after the mule is given a certain length of time in pack, what do you have them do next?

(Testimony of Emmet Myron Ennis.)

A. Well, whenever the trail foreman and the packer thinks they are gentle enough they are brought into the buildings there from Yankee, if they happen to be at Yankee, and the trail foreman will put the guides on them and they will ride them for a certain length of time, until they determine they are safe for "dudes" to ride.

Q. You said something about the guides, while they are in pack, will also ride them; that is, the packers ride them?

A. That is right; that is the way they are started in; when they first start in on the pack train the mules will probably go down with just a light saddle on them, maybe a [15] couple of canteens of water, and keeps building up until they can handle the load on there, and learn the trail, and then the packer will change, he will alternate, and he will ride one mule a little while and change and put his saddle on another, and that is the way they are broke to ride.

Mr. Schell: That is all.

Redirect Examination

Q. By Mr. Lincoln: Do they keep any record, Mr. Ennis, of the mules? I mean by that, a record such as how many times they have been down the trail, or what they carry or anything of that sort?

A. No; the packer keeps a record of what he takes down to Phantom Ranch, but he does not keep what goes down on the individual mule.

Q. That is what I mean. Speaking about the

(Testimony of Emmet Myron Ennis.)

—you were speaking about the Indian Garden in response to a question from counsel. Now, what is the "Indian Garden" or "Gardens"? Is there on "s" on the end of that?

A. The Indian Gardens.

Q. "s"? A. Yes.

Q. What is that?

A. Well, it got its early name—the Indians were the first ones that had a trail into Grand Canyon, and they raised corn and one thing and another down there; the springs [16] breaks out there where they could irrigate, and when the white man, as I understand, first built trails in there they named it the "Indian Gardens."

Q. Well, at the present time, or in 1942 at any event what was there there? What did the Indian Gardens consist of?

A. The Indian Gardens consisted of a pump-house and a couple of cottages, a cottage maintained by the Santa Fe Railroad—by the Santa Fe Railroad for their maintenance crews when they go down there to work on the pipe lines, or the electric lines, and the Government has a house there that their trail maintainers live in.

Q. How far down did you say that was from the rim? A. About three and a half miles.

Q. Was that one of the stopping places on the trail trips?

A. That is a rest stop both going and coming.

Q. Is that the only stop they make on the trail going down or coming up?

(Testimony of Emmet Myron Ennis.)

A. Well, to dismount, yes, unless somebody gets exceedingly tired.

Mr. Lincoln: That is all.

Mr. Schell: That is all.

The Court: All right. [17]

ELMER H. MATEAS,

the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

The Clerk: Please state your name.

A. Elmer Mateas.

Mr. Lincoln: This witness, your Honor, is extremely deaf.

The Court: That is all right. You can come up here.

Mr. Lincoln: He has to use one of his machines there.

The Court: Well, that is all right.

Mr. Lincoln: I might be permitted to interrogate the witness closer than this?

The Court: Yes; stand here, if you want.

Direct Examination

Q. By Mr. Lincoln: Mr. Mateas, how old are you? A. 31.

Q. Did you ever go to the Grand Canyon?

A. Yes, sir.

Q. When did you go there the first time?

A. The first time was in 1941, about July.

(Testimony of Elmer H. Mateas.)

Q. And at that time did you take any excursion down Bright Angel Trail?

A. We wanted to. We was unable to make the accommodations. [18]

Q. Did you go there about June, 1942?

A. Yes, sir.

Q. And do you remember what day it was that you arrived at El Tovar?

A. We arrived on June 16th.

Q. How did you come, by automobile or stage?

A. Automobile.

Q. Anybody with you? A. My wife.

Q. Now, do you remember the day of the week that it was you arrived?

A. We arrived on a Tuesday.

Q. And at that time did you discuss with anybody about going down the Bright Angel Trail?

A. We took our tickets out at the hotel, at the booth reserved for that, discussed with the man that sold tickets——

Q. Do you know what his name is?

A. No, I don't.

Q. What did you say to him, if anything, concerning a proposed trip?

Mr. Schell: To which we object as being incompetent, irrelevant and immaterial; be hearsay, and no foundation laid as to what this witness said to whoever was at the ticket window.

Mr. Lincoln: This was the man from whom they purchased tickets to go on the trip. This was

(Testimony of Elmer H. Mateas.)

the man this [19] witness just testified about who was in the booth, the special booth which they had for this particular trip.

The Court: You mean for the mule trip?

Mr. Lincoln: Yes, sir.

The Court: Well, all right. I think subject to a motion to strike, it may be admitted. Objection overruled.

Mr. Lincoln: Let me go into it perhaps a little more deeply, your Honor; the detail of it will perhaps appeal to your Honor.

Q. By Mr. Lincoln: This booth you speak of, where was that situated?

A. I am not sure at the El Tovar, but one of the hotels, like in the lobby, like an alcove off on one side of it, and it was like a corner, in front of it, and the man sold tickets behind that.

Q. Tickets for the excursion, you mean?

A. Yes; maybe or maybe not, they had tickets for sale—to different things—I don't know.

Q. As I say, did you have some discussion with him about the trip?

A. I told him I had never ridden any mules before.

Mr. Schell: I object to the answer. The question just called for a yes or no answer.

Mr. Lincoln: The answer may go out.

Q. By Mr. Lincoln: Say "yes" or "no" whether you [20] had a discussion or not.

A. Yes.

(Testimony of Elmer H. Mateas.)

Q. Now, what did you say to him and what did he say to you?

Mr. Schell: To which we make the same objection.

The Court: The same ruling. Go ahead.

Q. By Mr. Lincoln: Go ahead.

A. I told him I never had ridden any mules before, or horses either, and he says probably 75 per cent of the people who made the trip had never been on a mule or horse before.

Q. Anything else you said at the time?

A. Nothing I recall in particular, except—on that subject.

Q. Was your wife there with you at the time?

A. She was with me at the time.

Q. All right. Did you buy any tickets for such a trip? A. Yes, sir, we bought two tickets.

Q. And how much did you pay for those?

A. I don't recall.

Q. Did you pay something?

A. We paid something.

Q. Then was that for a trip that same day?

A. No, for a trip the next day.

Q. The next day? Well, now, what did you do the [21] next day with relation to this trip? Where did you go and what did you do?

A. The corral where they had the mules saddled and ready was at the head of the trail, and we went to the trail at 11 o'clock, the time the ticket called for.

Q. And you went to this corral, did you?

(Testimony of Elmer H. Mateas.)

A. Yes, sir.

Q. Did you see any mules in the corral?

A. Yes, sir.

Q. Were there any people other than your wife and yourself who were to take this trip?

A. Yes, sir.

Q. Were they at the corral to go about this same time?

A. There was one party going down ahead of us, several people already there, whether our party was there first or after—well, we did—I don't know —but many people around.

Q. How many people were there in your party?

A. About seven.

Q. Who selected, if anybody, who selected the particular mule for you to ride?

A. The trail master.

Q. And how was that selection made? That is, what did he do or what did he say?

A. Well, he just picked out a certain person for a certain mule. He called me over there for the mule going [22] out, and that was all.

Q. Was that the mule you rode all the way down? A. Yes, sir.

Q. Did you ever see this particular mule before that day? A. No, sir.

Q. Had you ever ridden a mule before that day?

A. No, sir.

Q. Or a horse? A. No, sir.

Q. Had you ever been down this trail before?

A. No, sir.

Q. Either on foot or on muleback?

(Testimony of Elmer H. Mateas.)

A. Neither one.

Q. Did you notice the other people who were to take this same trip as they got on their mules?

A. I am not sure I understand what you mean.

Q. Did you see these other people who were going with you? A. Yes, sir.

Q. Did you see them as they got on their resepective mules?

A. Not all of them, to say they were all mounting one after another, I saw them.

Q. You saw them getting on from time to time?

A. Yes, sir. [23]

Q. Did you notice anything different between the way any of these people held their reins for their mules from the way you held yours?

A. Yes, sir.

Q. Now, wait a minute. You said yes? What was that way? Go ahead. What was that?

A. Our party, or the other party, or both, they let their reins hang from the saddle horn loose, and let it hang there, and I did the same, and the trail master came over and told me to hold the reins in my hands at all times.

Q. Do you see the trail master in the courtroom today? A. I believe I do.

Q. Which one is it?

A. The second one over there from the inside.

Q. The gentleman with the red tie?

A. Yes, sir, the red tie. I didn't see that.

Q. You remember the name of the man who was the guide on the trip?

(Testimony of Elmer H. Mateas.)

A. The guide on the actual trail was Bob Ennis.

Q. How old a man would you say he was, approximately? A. About 20.

Q. Where was he in relation to the other persons in the string of mules?

A. He was in the lead.

Q. And where were you in relation to the rest of them? A. I was the last. [24]

Q. Did Mrs. Mateas go on the trail with you?

A. Yes, sir.

Q. And where was she in the string?

A. She was pretty close to the front.

Q. What day was it you went down on the trip?

A. June 17th.

Q. What year? A. 1942.

Q. I show you a photograph and ask you if you have ever seen that before? A. Yes, sir.

Q. When was that taken?

A. On June 17th when we was just starting the trip.

Q. What does that photograph represent?

A. That is the particular party I was in, my wife and I.

Q. And showing you this and calling your attention to the person at the very end of the string there, the one at the top of the picture, who is that? A. That is my picture on the end.

Mr. Lincoln: We will offer this, your Honor.

Mr. Schell: Just a minute. Let me see it.

The Court: Go ahead. It may be received.

Mr. Schell: No objection.

(Testimony of Elmer H. Mateas.)

The Clerk: 4 in evidence.

Q. By Mr. Lincoln: Now, as you started down the [25] trail this particular day, what was the condition of your health?

A. There was nothing wrong with my health.

Q. Was there anything wrong with your back?

A. Not in the least.

Q. Did you have any injury to your back of any kind? A. Not in the least.

Q. Did anything happen on the trip?

A. Yes, sir.

Q. Where did it happen with reference to the rim or the river?

A. It was quite a ways down—quite a ways down the rim, I believe it was; I understand about a half mile before you reach the river.

Q. After you had passed Indian Gardens?

A. After we had passed Indian Gardens.

Q. Do you remember what time it was you got to Indian Gardens?

A. Got at Indian Gardens about 2 o'clock, or a little after. I don't know exactly.

Q. What was done at Indian Gardens?

A. We had lunch at Indian Gardens.

Q. Everybody dismount?

A. Everybody dismounted.

Q. On the way down how did your mule act?

A. On the way the mule—well, he tried to run away [26] with me four or five times.

Q. What did he do?

(Testimony of Elmer H. Mateas.)

Mr. Schell: Just a minute. I move to strike that.

Mr. Lincoln: That may go out. That is all right. That may go out.

The Court: Yes.

Q. By Mr. Lincoln: Just tell us what he did. How he acted.

A. Well, just by walking along like the rest he would suddenly try to squeeze through the other mules and get away over the line, away from the end of the line, try and squeeze up through the trail, get out in front.

Q. Did he do that on more than one occasion?

A. Yes, sir.

Q. Did he buck at all before you reached Indian Gardens? A. No, sir.

Q. At Indian Gardens, or thereabouts, was there some change made between you and some other person in the party? A. Yes, sir.

Q. A change of mules? A. Yes, sir.

Q. How did that come about?

A. Well, the man directly in front of me, Mr. Boles, talked about it once in a while, and he was the one that said my mule—we discussed I wasn't an experienced rider, [27] and he was an experienced rider, and he offered to trade mules with me. At Indian Gardens we traded mules.

Q. And were you put last, or put next to the last in the string?

A. Oh, we hadn't even started up again.

(Testimony of Elmer H. Mateas.)

Q. You hadn't started up again? What happened?

A. We were on the mules; Bob Ennis came back checking us, he saw we were on different mules, and he made us return to our original mules.

Q. What did he say to you in that regard?

A. Word for word, I wouldn't know, but in effect that we had to keep the mules we was given with up above.

Q. Did either you or this other gentleman tell him why you changed mules? A. Yes, sir.

Q. What did you tell him?

A. I told him that——

Mr. Schell: That is objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Q. By Mr. Lincoln: What did you tell him?

A. I told him, in effect, I could not handle the mule I was on; Mr. Boles said he could handle any mule; we wanted to trade over.

Q. Now, after you had rested at Indian Gardens and you started out again, did anything else happen with you and [28] your mule?

A. Yes, sir.

Q. What happened?

A. Why, immediately at Indian Gardens I lined up at the water trough; the mules drink before we start off; the mule once again tried to start off as before, to break loose.

Q. What was the result of that?

(Testimony of Elmer H. Mateas.)

A. Well, the same as always had previously; I was told to rein him in, or put him back in line when he did that.

Q. And then a little bit later did something else happen with the mule and yourself?

A. Yes, sir, a little bit later he ran off and this time I tried to rein him up and he went into a buck and threw me off.

Q. Do you know how many times he bucked?

A. Not by actual count.

Q. Was it more than one? A. Yes, sir.

Q. He threw you off? Now, just where did you land, if you know, with reference to the trail itself?

A. I believe I landed a little bit off the trail.

Q. And where did you land with reference to your own body? A. On the base of my spine.

Q. Do you know what happened to the mule, after he [29] bucked you off? A. I don't.

Q. When you landed at the base of your spine did you have any pain immediately?

A. Yes, sir.

Q. And did that pain continue?

A. Yes, sir.

Q. For how long a period?

A. Well, it grew worse as I went along.

Q. How long were you on that particular spot where you landed? I mean the spot of ground, before you were moved at all?

A. About four hours.

Q. And then what was done?

(Testimony of Elmer H. Mateas.)

A. A doctor came down from the rim and he gave me a shot in the arm and some pills and taped me up.

Q. Did that shot in the arm you speak of have any effect as far as the attending pain was concerned? A. Very little, if any.

Q. He taped you up? A. Yes, sir.

Q. Now, he taped you to and from where?

A. Well, he had wide strips of adhesive tape and taped across my back from rib to rib, approximately across the spine.

Q. Did that have any effect as far as mitigating the [30] pain was concerned? A. Some.

Q. What time of day was that, do you remember?

A. When he arrived it was about 7 o'clock in the evening.

Q. In the evening? A. Yes, sir.

Q. Did you finally get up to the north rim?

A. Yes, sir.

Q. That day?

A. We were at the south rim.

Q. At the south rim, I should say.

A. Not that day.

Q. Not that day? A. No.

Q. You finally got up there?

A. Finally got up there.

Q. How did you get back?

A. They brought a mule, a stretcher-bearer mule, down and roped me to a stretcher fastened to the mule and went back up that way.

(Testimony of Elmer H. Mateas.)

Q. Was there anything said before that time about taking you up on muleback without a stretcher? A. I didn't hear anything.

Q. Now, when you got to the south rim what time was it? [31]

A. It was about 5 o'clock the next morning.

Q. And where were you taken then?

A. To the Grand Canyon Hospital.

Q. How long did you stay in the hospital?

A. About three weeks.

Q. Were you in bed a portion of that time?

A. Yes, sir.

Q. How long? A. About two weeks.

Q. Attended by a physician? A. What?

Q. Attended by a doctor during that period?

A. Yes, sir.

Q. What was the name of the doctor?

A. Dr. Cox.

Q. Who selected the doctor?

A. He was a doctor in the hospital.

Q. Did you have a nurse, also?

A. Yes, sir.

Q. Do you know the name of the nurse?

A. Miss Coulter.

Q. How long were you confined to bed?

A. About two weeks.

Q. During that period, did you still continue to suffer this pain in your back?

A. Yes, sir. [32]

Q. How serious was that? Can you describe that pain in any way?

(Testimony of Elmer H. Mateas.)

A. Well, the doctor wanted to take X-rays and he gave me more shots.

Q. Did those have any effect in either lessening or completely stopping the pain?

A. They might have lessened it a little, but very little, if any.

Q. Where was this pain in your body particularly?

A. Low on my back and kind of centered over towards my right hip.

Q. In adition to this pain, did you have any other suffering in your body? Any other portion of your body? A. I had a skinned elbow.

Q. Head ache at all? A. Yes, sir.

Q. For how long a period did that continue?

A. The headaches more or less continue yet.

Q. After you were permitted to get out of bed, how long then did you remain in the hospital?

A. About a week.

Q. And what were you doing then; that is, in relation to any manipulations of your legs, or arms, or back?

A. Well, I was trying to be able to move enough to be allowed to go home. I came first from setting up in bed to a wheelchair and then trying to walk.

[33]

Q. How would you attempt to walk?

A. Holding my—supporting myself by a chair, and pushing the chair across the room.

Q. Up to the time of the 17th of June what had been your occupation over a period of years?

(Testimony of Elmer H. Mateas.)

A. I was a plastering contractor.

Q. You were a plastering contractor?

A. Yes, sir.

Q. Did you do plastering yourself?

A. Yes, sir.

Q. Interior?

A. Both interior and exterior.

Q. Exterior? What we call stucco; is that right? A. Stucco, yes.

Q. Does that work of yours require heavy, physical exertion? A. Yes, sir.

Q. For how long a period had you been engaged in that work?

A. Oh, about 15 years. I started when I was about 16.

Q. And you say you were a contractor. By that, you took contracts yourself, did you?

A. Yes, sir.

Q. For large or small jobs? A. Both.

[34]

Q. And then you hired men to help you?

A. Yes.

Q. To assist you in the plastering?

A. Yes, sir.

Q. You actually worked on the job yourself all the time? A. Yes, sir.

Q. Did you charge or credit to yourself a daily wage, or a yearly, or a weekly wage, for the work which you did yourself?

A. No, I kept a general idea, job by job; what was left over after expenses was paid was mine.

(Testimony of Elmer H. Mateas.)

Q. And over a period of years, we will say the two years before 1942, what had been your average monthly net earnings?

A. Between three and four hundred dollars a month.

Q. When was it you returned to Los Angeles?

A. About July 8th, I believe it was.

Q. And how did you come back?

A. By auto.

Q. The same auto you went with?

A. Yes, sir.

Q. Who drove? A. My wife.

Q. Did you suffer any pain on the way back?

A. Yes, sir. [35]

Q. Where were you? On what seat did you sit, or did you sit at all?

A. I was blocked up all around; they gave me several pillows, and we had pillows we taken with us; I was blocked with pillows all around me, and I sat on the front seat on the right-hand side.

Q. Was that the suggestion of Dr. Cox?

A. Yes, sir.

Q. And was all the work which you did in the hospital, or all the changes which you made from time to time, under the direction of this same Dr. Cox? A. I didn't understand that.

Q. I mean did anybody give you any—tell you what to do, or what not to do, while you were in the hospital, except Dr. Cox and the nurse?

A. Only Dr. Cox and the nurse.

(Testimony of Elmer H. Mateas.)

Q. I show you Exhibit No. 1 for identification and ask you if you ever saw this circular before.

A. Yes, sir.

Q. Do you remember when you saw it?

A. I saw it both in 1941 and again in 1942.

Q. And where? A. At the Grand Canyon.

Q. In the Harvey House, or, rather, in the El Tovar? A. In the El Tovar.

Q. Yes. Now, I want to call your attention to a [36] paragraph in this circular, "Trail Trips Into the Canyon. Although visitors may venture short distances down these trails on foot, the accepted mode of travel for longer journeys is by the famous Grand Canyon mules. These faithful, sure-footed animals, in charge of experienced guides, hold a 30 years record of carrying many thousands of inexperienced riders down the trails and back in perfect safety."

Did you read that before the 17th of June?

A. Yes, sir.

Mr. Schell: Just a moment. I object to that. I don't see the materiality of that in view of the pleadings in this case. The pleadings, as I see them now, your Honor, are these: That this particular mule "Chigger", which they claim to be the bad actor in this particular thing, was supposed to be a mule who had never been ridden by "dudes", or anybody, down the trail. In other words, that is the only thing that I think plaintiff states a cause of action in the present thing, that that was an inexperienced mule that had never been ridden be-

(Testimony of Elmer H. Mateas.)

fore, and I don't see the materiality of anything that might be in the literature to bear upon that subject, as to whether or not this mule "Chigger" had, or had not, had previous "dude" experience.

Mr. Lincoln: I don't understand, your Honor, we are confined to one word or one sentence, in our pleadings. [37]

The Court: Well, you are not. That is a guarantee of the pack. You are not claiming the pack was a wild pack.

Mr. Lincoln: No, sir.

The Court: This statement would be a guarantee of the pack. Some of your language would seem to apply. You would like to apply to this the common carrier rule; if an accident happens in a railroad, or street car, the company is blamed. I can't see where that language has to do with this.

Mr. Lincoln: May I suggest this, your Honor. Assuming that this gentleman did read this language and believed that it was true, believed that those mules, whichever mule it may be, either the mules in general or any one mule in particular, was a safer mule for an inexperienced rider.

The Court: Yes.

Mr. Lincoln: He had a right to rely upon that.

The Court: You are not charging fraud here.

Mr. Lincoln: Not at all; no, sir; not at all.

The Court: He had the right ot rely on the ordinary thing, that it was a safe animal.

Mr. Lincoln: Yes, sir.

(Testimony of Elmer H. Mateas.)

The Court: And it is implied in the contract. In other words, it is not the strength of the guarantee, it is the fact of the knowledge on their part that it was a balky [38] mule; that is the cause of action; not the guarantee they gave you that it was safe to ride.

Mr. Lincoln: Yes, your Honor is quite right, but unfortunately I cannot prove my entire case with one question, nor even perhaps with one witness; I have to do things in piecemeal; I have to take little bits of blocks and try to fit a jig-saw puzzle together for your Honor to see the finished picture, and it did seem to me this particular phrase here was extremely material for a person to place his reliance upon and allow himself to be put upon the back of a mule that he had never seen before, trusting implicitly to the warranty which was in this clause.

The Court: That would not make a cause of action. That would not be a cause of action anyway. Supposing he threw away the reins and sat there instead of riding?

Mr. Lincoln: Quite right, sir.

The Court: That guarantee is just about as broad as any. It is the safety of the mule, like a safe horse.

Mr. Lincoln: I expect to connect up the fact that this——

The Court: He has already testified he had told him he had never ridden a horse or mule, and told them to pick a mule for him that was all right;

(Testimony of Elmer H. Mateas.)

the mule took him up the trail safely, when he started to buck when he came back, so I can't see how that adds anything to what is already in the record, because it is not a question of whether all the mules [39] were safe, whether this particular mule was safe to ride, that concerns us.

Mr. Lincoln: Your Honor is quite right, but here is an absolutely unlimited statement of all of these wonderfully safe mules, every mule, not only the one which we rode, but all the rest, not only all the rest, but the one which we rode.

The Court: In the face of the testimony you have given——

Mr. Lincoln: I was going to ask leave to introduce this circular, anyway, but I wanted to ask him one other question in relation to that clause as to whether he believed it or not.

The Court: All right.

Mr. Lincoln: I suppose my learned opponent will object to that, too.

The Court: He has got to protect his rights. We are not making the law, we are merely following the law that the courts of California have laid down as to conditions of recovery.

Mr. Lincoln: Your Honor is quite right, of course.

The Court: You have tried on the defendant's side as well as the plaintiff's to protect his client's rights. Objection overruled. You may answer. Read the question.

(Question read by the reporter.) [40]

(Testimony of Elmer H. Mateas.)

Q. By Mr. Lincoln: Now, the question is, did you read that paragraph before the 17th of June?

A. Yes, sir.

Mr. Schell: May we have the same objection?

The Court: Yes. Overruled.

Q. By Mr. Lincoln: Did you believe it?

A. Yes, sir.

Q. I now show you what seems to be some bills here, one headed F. E. Cox; one the El Tovar Hotel; one of the Grand Canyon Hospital; and ask you *if have* seen those bills before?

A. Yes, sir.

Q. Were those the bills which were rendered to you by Dr. Cox and by the hospital?

A. Yes, sir.

Q. For the treatments which you received after your injury? A. Yes, sir.

Q. That of Dr. Cox being in the sum of $90; the hospital being $145.50; and this bill of the El Tovar $3.57; you paid that, did you?

A. My wife has ordinarily. I know nothing about it.

The Court: Don't you pay your wife's bills?

Mr. Lincoln: That happens to be paid, your Honor. It is marked paid. I don't know who paid it.

The Court: A lucky man if he doesn't have to pay his [41] wife's bills.

Mr. Lincoln: Yes, sir. We will now offer this circluar heretofore, this circular Exhibit 1 for identification, now in evidence.

(Testimony of Elmer H. Mateas.)

Mr. Schell: You are offering it in evidence now?

Mr. Lincoln: Yes.

Mr. Schell: I am objecting to it as incompetent, irrelevant and immaterial, and not within the issues as framed by the pleadings.

Mr. Lincoln: The witness identified it as being a circular which he obtained from the El Tovar and which describes the trail trips.

The Court: Let me see it.

(Circular shown to and examined by the Court.)

The Court: All right. Objection overruled.

The Clerk: 1 in evidence.

The Court: It may be received.

Mr. Lincoln: We now offer, your Honor, bills of Dr. Cox and the Grand Canyon Hospital.

The Court: All right. Be received.

The Clerk: Plaintiff's Exhibit 5.

Mr. Lincoln: Your Honor, I have just received word that Dr. Sloan, who lives and has his office in Inglewood, and whom we desire to call as a witness for the plaintiff, has some operations scheduled for this afternoon, and tomorrow he has practically every moment filled for matters [42] which he has to attend to for the United States Army. He says, however, that he can, if your Honor can make such arrangement, be present here today at half past one; his reason for that being as I suggest, he has an operation almost immediately afterwards, just as soon as he can get

(Testimony of Elmer H. Mateas.)

away. I assume his testimony will be somewhat short; it will be confined to what he has discussed with me Mr. Mateas' condition to be when Mr. Mateas returned to Los Angeles from Grand Canyon. I wonder if it would be possible and suit your Honor's convenience, and that of counsel, if we might recess until 1:30?

The Court: Well, I have no objection to convening at 1:30.

Mr. Lincoln: In speaking with Mr. Schell, your Honor, he says——

Mr. Schell: I will accommodate you, counselor.

Mr. Lincoln: I appreciate that very deeply. I was about to suggest, your Honor, it might be possible if your Honor would recess at this time for Mr. Schell's convenience——

Mr. Schell: No, go right ahead.

The Court: I can't get out. Furthermore, I want to say, gentlemen, that there is a very urgent matter which I had to continue until tomorrow morning, and it is a type of matter I don't know how much time it will take; it is a very hotly contested matter relative to a judgment I rendered some time ago and involves a receivership, and also some [43] other matters, and I must hear it tomorrow morning, so it may well be that it will be necessary to take the morning for that matter, and not hold a session until in the afternoon, in which event I may convene at 1 o'clock tomorrow so as to conclude this case, because I have a criminal case scheduled for Thursday.

(Testimony of Elmer H. Mateas.)

Mr. Schell: If we can depend upon that and arrange that now, I would appreciate it very much.

The Court: I can't tell that now. I have to be governed by what goes on every day. I can't tell. I don't mind working long hours and it may be that we can get through today.

Mr. Lincoln: We will do the best we can.

The Court: If the case is not concluded today I cannot hold a morning session tomorrow; rather than call you at 11 o'clock for an hour, I would rather call you at 1 o'clock, and then hear that matter, rather than break the session and have a 4-hour session tomorrow.

Mr. Schell: That would be very satisfactory.

The Court: I am going to tell you that because that is a matter that came up yesterday, because I am negotiating a possible adjustment of the matter. If counsel does that, it won't be necessary; if they don't, it will take time and it will be necessary.

Mr. Lincoln: That is all. Your witness, Mr. Schell. [44]

Mr. Schell: We have no questions, your Honor.

The Court: All right. Step down. All right. Step down, Mr. Mateas.

JUNE MATEAS,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Mrs. June Mateas.

Direct Examination

Q. By Mr. Lincoln: Mrs. Mateas, are you related to Mr. Mateas who has just testified?

A. Yes.

Q. And what is that relationship?

A. He is my husband.

Q. Were you present with him in 1941 when you came to El Tovar, or when he was in the El Tovar? A. Yes.

Q. Was there some discussion between you at that time with relation to taking a Bright Angel trip? A. Yes.

Mr. Schell: I object to that as being immaterial what the discussion was in 1941. [45]

Mr. Lincoln: You are quite right. I am not going to get into that discussion.

The Court: All right.

Q. By Mr. Lincoln: Did you go with Mr. Mateas to El Tovar in 1942? A. Yes.

Q. And when did you leave Los Angeles?

A. We left Los Angeles on the 16th of June, 1942.

Q. And what was your means of transportation?

A. We drove our car.

Q. Did he drive all the way?

A. Yes, he drove all the way.

(Testimony of June Mateas.)

Q. And you arrived—what time did you arrive in El Tovar, do you remember?

A. Well, we arrived about—it was about 7—7 o'clock that evening.

Q. Stop at that hotel?

A. No, we didn't stop at El Tovar. We stopped at the court they have for autoists for accommodations.

Q. At the same time did you discuss with any persons about going—taking this Bright Angel trip? A. Yes.

Q. And where did this talk take place?

A. Well, it was at the El Tovar Hotel.

Q. Any particular portion of the hotel?

A. Yes, at the ticket agency there, the ticket booth [46] that sells tickets to the various trips.

Q. Was Mr. Mateas there at the time you had this talk? A. Yes.

Q. What was said between you and this person who sold you the tickets?

Mr. Schell: May we have the same objection, your Honor? Hearsay, incompetent, irrelevant and immaterial, and not having——

The Court: Overruled.

Mr. Schell: ——any bearing on the issues.

The Court: Subject to motion to strike.

The Witness: Shall I answer?

Mr. Lincoln: Yes.

A. We just talked about the mules and stated my husband—my husband stated he hadn't had any experience on any mules or horses, and the ticket

(Testimony of June Mateas.)

agent there told him most of the people didn't have that were taken down the trail on mules.

Q. Was that about all the discussion you had on that subject? A. That is about all.

Q. All right. Did you buy a ticket at that time?

A. Yes, sir.

Q. Do you remember what you paid for it?

A. I think we paid $18 a piece.

Q. Was that for a trip that day or a trip for some [47] other time?

A. That was a trip for the next morning.

Q. The next morning what did you do in relation to taking this trip?

A. Well, we drove our car over to the corrals which are at the top of the Bright Angel Trail, and parked our car there and went over to the corral, looked at the mules that were standing there, and then we went down to the corral and the trail foreman placed us—we waited for him to assign us to our mules.

Q. By the trail foreman do you mean Mr. Bradley, who is in the courtroom?

A. I think that is his name.

Q. The gentleman with the red necktie?

A. Yes, that is right.

Q. Did you have any conversation with him about who should take any particular mule?

A. I didn't, no.

Q. What was the manner of assigning you to a mule, or any persons that you saw?

(Testimony of June Mateas.)

A. Well, he just looked at the person and looked at the mule and then assigned the person to the mule that he——

The Court: Introduced each person to the mule and each mule to the person?

The Witness: That is the general idea.

Q. By Mr. Lincoln: Do you remember what time it was [48] you started down the trail?

A. Not the time we started down the trail, no.

Q. But you got there at what time?

A. Our tickets said to be at the corral at 11 a.m., and we did.

Q. How long did you stay there at the corrals before you went down, approximately?

A. Oh, approximately a half hour.

Q. Was there any other party that was there at the time or went down ahead of you?

A. Yes, there was a party preceding ours that was heading down the trail.

Q. How many people were there in your party?

A. Counting the guide?

Q. Counting the guide, yes.

A. Seven—six, seven—just a minute—there was six or seven.

Q. Where were you in sequence in the string?

A. I was fourth from the end.

Q. And Mr. Mateas was where?

A. At the end.

Q. The guide, of course, at the front?

A. Yes.

(Testimony of June Mateas.)

Q. Did you notice anything unusual with relation to Mr. Mateas' mule on the way down?

A. On the way down? [49]

Q. Yes.

A. Yes, he tried to squeeze past the rest of us a number of times.

Q. Was that on the inside or the outside of the trail? A. On the outside.

Q. By the "inside" I mean the side nearest the canyon wall.

A. No, he would squeeze to the left; that would be the drop side of the canyon.

Q. Did you see him buck at all on the way down? A. Not preceding the accident, no.

Q. That is what I mean. Now, you got to Indian Gardens at what time, if you remember?

A. I don't know.

Q. But at any event, there you had lunch and stopped for a little while? A. That is right.

Q. When you went on from there did anything happen with relation to Mr. Mateas and the mule?

A. Well, at the water trough we stopped to water the mules——

Q. Yes.

A. ——and he got on another man's mule that was there, and the guide made him exchange mules, and then when we proceeded his mule tried to get ahead of the rest of ours.

Q. Now, just a minute. At the water trough when they [50] exchanged the mules, did you have

(Testimony of June Mateas.)

any conversation with the guide, or hear any conversation between him and Mr. Mateas?

A. No.

Q. All right. And so they exchanged mules? And then did they exchange them back again?

A. Yes, the guide told them to revert to their original mules.

Q. Well, then, after that what happened?

A. Well, then we proceeded down the trail towards the bottom of the Canyon.

Q. Yes.

A. And we were just rounding, going through a little dip and into a bend, and the mules were struggling, like they are inclined to do, and Bob, our guide, told us to close up the mules, and he stopped at the head to let the mules close up; of course, the rest of the mules stopped, too, and we would try to urge them on a little, and the first thing I heard, I heard someone scream, and I looked up and the girl in front of me, she had a very horror-stricken look on her face; or was, rather, back of me, and I turned around and I heard a lot of commotion was going on I heard at the same time, and I turned around and as I turned I saw the mule bucking with my husband, and I saw two bucks and the second buck he was thrown over the mule's head.

Q. To the left or the right of the mule?

A. Directly in front of the mule. [51]

Q. Right in front? Where did he land; that

(Testimony of June Mateas.)

is, as far as the ground was concerned, as compared with the trail itself?

A. You might call it on a shoulder of the trail.

Q. And what did you do then immediately after?

A. Well, I immediately dismounted and ran back to see what had happened to Mr. Mateas. This man that was in front of him got down, too, and we tried to help him but he was in such intense pain we could not touch him.

Q. Well, now, what was his posture at that moment? Was he standing, or lying, or what was it?

A. He was just curled up, cramped up; his knees were drawn up.

Q. How long did he remain in that particular position?

A. In that position it was about four hours.

Q. During that four hours did you remain there? A. Yes, I stayed right by him.

Q. Did the other party go on, or the balance of the party go on?

A. The rest of the party, except our guide and this gentleman stayed with me.

Q. The others went on?

A. The others went on.

Q. That is, the ladies of the party continued on; is that it? A. Yes, sir. [52]

Q. And then some time after that, did anybody come to where you were?

A. At 7 o'clock that evening a party came down, including the doctor.

(Testimony of June Mateas.)

Q. And what did the doctor do?

A. The doctor gave my husband a shot in the arm and a pill of some sort, and then they tried to straighten him out and move him to a blanket, but——

Q. Just a minute. Did that "shot" you speak of have any effect in relieving his pain?

A. Very little. He is not susceptible to hypodermics.

Q. When they attempted to move him what effect did that have on him as you observed?

A. As I remember, his pain was so intense and terrific at that time that he cried out with the pain and asked them not to move him, not to touch him.

Q. Did he gradually get straightened out, finally?

A. Well, they straightened him out—just below his legs it started.

Q. Was he left to lay on the ground?

A. They moved him to a blanket on the trail.

Q. And then was there any discussion about—withdraw that question—was there any discussion between the guide and this physician who came down, or whoever it was, with regard to taking him back, or how they would take him back? [53]

Mr. Schell: That is objected to as immaterial, what discussion may have been had between the doctor and the guide; I don't see the materiality of that.

(Testimony of June Mateas.)

The Court: I don't see the materiality. I suppose I can take judicial notice he was in pain; anybody falling and hurting his back will suffer pain.

Mr. Lincoln: There was something else, your Honor, which I did not like to indicate to the witness, if your Honor will bear with me and permit the answer to the question, subject, of course, to counsel's motion to strike it out, I think your Honor will consider it material. It is not an idle question.

The Court: Well, all right. Overruled. Go ahead.

The Witness: Will you state it again?

Q. By Mr. Lincoln: I am talking about whether there was any discussion as to how he should be taken back.

A. Well, yes, they said they would have to send for a litter-bearing—a litter to bring him back up to the top.

Q. Well, did they? Afterwards was he taken back?

A. Yes, after a time, when they brought a litter down.

Q. Now, will you describe that litter to us, please?

A. Well, the litter is a canvas and it seems to me it had pipe framed around it, and it has—they have a specially-constructed saddle for the mule; it is on the order of a "V", if I remember correctly, and the litter is placed in that "V" and rides—then tied on in some manner [54] and rides with or against the mule, whichever way the mule

(Testimony of June Mateas.)

happens to be, when the mules takes a step the litter bounces one way and bounces the other way, and sways from side to side. There is no stability, at all, to it.

Q. It was on this one mule?

A. Yes, on one mule.

Q. Did you accompany Mr. Mateas on his way back? A. Yes.

Q. Do you know if he suffered any pain during that trip up?

A. He did. He cried out all the way up, and moaned all the way up.

Q. What time did you arrive at the top, do you remember?

A. Well, it must have been around 5 o'clock in the morning.

Q. And where was Mr. Mateas taken then?

A. He was moved to the Grand Canyon Hospital.

Q. And remained there how long?

A. Three weeks.

Q. Where did you stay in the meantime?

A. Well, the first thing, all that morning, half the day I spent at the El Tovar Hotel, and then I spent, I think, three or four days at the auto court, and then the doctor told me I could come and stay at the hospital.

Q. During that entire period did you watch Mr. Mateas? [55] A. I was there constantly.

Q. And observed his condition? A. Yes.

(Testimony of June Mateas.)

Q. Do you know if he suffered any pain during that period?

A. Yes, he did, he suffered all the time.

Q. And for how long a period was he in bed?

A. He was in bed about two weeks.

Q. And how long after that was he in the hospital before he was released?

A. About a week.

Q. Between the time he was in bed and during the period he was in the hospital in that week, what was he able to do, if anything?

A. Well, the first couple of days he sat up on the edge of the bed, but he was too dizzy and sick. And he had to be put back into bed, and then they put him in a wheelchair and he was in the wheelchair for a couple of days, and then he started to learn to walk over again by pushing a chair in front of him, shoving it and shuffling along behind it.

Q. Do you know whether these mules that went down on this trip with you had any names attached to them?

A. Yes, we all give the name of the mule which we were on.

Mr. Lincoln: Does your Honor recess promptly at 12 [56] o'clock?

The Court: I am going to today, because I am having a short recess. Ordinarily I don't look at the clock and I don't like to stop in the middle of an examination.

(Testimony of June Mateas.)

Mr. Lincoln: Which is all right with us. I am willing to continue.

The Court: I think we will stop because I have an engagement at 12 o'clock to meet another judge, and the time we lose, if any, at the noon hour, we will make up late in the afternoon. So we will declare our recess now until 1:30.

(Whereupon an adjournment was taken until 1:30 o'clock p.m. of this same day.) [57]

Afternoon Session
1:30 o'Clock

The Court: All right. Proceed. Put on your doctor.

Mr. Lincoln: Will you come around, Dr. Sloan?

LEIGH E. SLOAN,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Will you please state your name?

A. Dr. Leigh E. Sloan.

Direct Examination

Q. By Mr. Lincoln: Are you a physician and surgean, doctor? A. I am.

Q. Licensed to practice in the State of California? A. Yes, sir.

Q. How long have you been practicing in the State of California?

(Testimony of Leigh E. Sloan.)

A. A little over fifteen years.

Q. From what college did you originally attend and graduate?

A. Rush Medical College of the University of Chicago. [58]

Q. When was that? A. 1927.

Q. And you have any other degrees from that—except from that college?

A. I have a B.S. and an M.D., yes.

Q Did you practice in Chicago or Illinois at all? A No.

Q All your practicing has been confined to California? A. It has.

Q. Is that a general practice? Have you specialized in any particular branch?

A. A limited practice now, mostly medicine and some surgery.

Q. By "now" you mean in the last few years?

A. In the last five years.

Q. Do you know Mr. Elmer Mateas?

A. I do.

Q. The gentleman who sits over here behind me? A. Yes, sir.

Q. Did you have occasion to make an examination of his physical condition at some time?

A. I did.

Q. And when was that?

A. I think it was—I have—may I use——

Q. You have some notes?

The Court: Yes; anything to refresh your recol-

(Testimony of Leigh E. Sloan.)

lection. [59] You are not supposed to carry those facts in your head.

The Witness: Yes. The 14th of July, 1942.

Q. By Mr. Lincoln: And where did that examination take place?

A. In my office, 511 East Manchester Boulevard, in Inglewood.

Q. Now, will you please describe the examination which you gave him at the time, and what you observed?

A. He complained of having a pain—he complained of having been thrown from a mule or donkey in the Grand Canyon and had suffered injury to his back, and from which he had been hospitalized, so he told me, approximately three weeks; and he complained of pain in his back on motion, and there was tenderness on examination and limitation of motion due to the pain. X-rays that were taken in our office and read by Dr. Matzen, a Roentgenologist, who interprets our x-ray reports. May I read that report?

The Court: Yes.

A. (Reading). "7-15-42. Lumbar spine and pelvis.

(a) projections of the lumbar spine discloses irregularity of the outline of the right transverse process of the first lumbar segment consisting of a shadow of decreased density traversing the process. This finding is indicative of a fracture."

The Court: No sacro-iliac involved?

(Testimony of Leigh E. Sloan.)

The Witness: No evidence on any injury to the bony [60] structure.

The Court: To the bony structure? Where was the fracture? Does it say?

The Witness: Yes, in the right side in the first lumbar vertebra.

The Court: In the right side in the first lumbar vertebra?

The Witness: The transverse process. I have the x-rays here that were taken at that time.

The Court: Well, do you desire to see them, Mr. Schell?

Mr. Schell: Oh, I think not at the moment, your Honor. I think I can develop what I want on cross examination.

The Court: We have a shadow box, you know.

Mr. Schell: Yes, but I think not. I think I can develop it from the doctor's questioning.

The Court: All right.

Mr. Schell: I think possibly we can. That was incomplete, was it, doctor?

Mr. Lincoln: Mr. Schell,——

The Witness: Well, it wasn't——

(Counsel hold conference outside of the hearing of the reporter.)

Q. By Mr. Lincoln: Now, doctor, tell us whether or not an injury of that character was a painful injury. A. Very painful. [61]

Q. And could you say what treatment of that injury did you suggest?

(Testimony of Leigh E. Sloan.)

A. Well, immobilization and heat, and I referred him to an orthopedist in the city, Dr. Gibboney.

Q. Do you know of any other treatment which would be of any benefit to an injury of this character, other than what you gave?

A. Well, in some cases that are extreme they might go in there and try to take out that fragment.

Q. In this instance you didn't recommend that?

A. I didn't.

Q. Could you say for about how long a period such a condition as this might continue?

A. I cannot say.

Q. Well, is it something——

A. It continues a long while.

Q. It does take a long while?

A. A number of years.

Q. When was the last examination you made of Mr. Mateas?

A. 31st of March, 1943.

Q. And what did you find his condition at that time to be?

A. He still had—complained of tenderness and some limitation of motion, and inability to lift the same things that he previously lifted in his work.

[62]

Q. Would it be possible for you to say, give us any estimate of time in which that condition might continue or be completely remedied?

A. I could not.

Mr. Lincoln: Your witness.

(Testimony of Leigh E. Sloan.)

Cross Examination

Q. By Mr. Schell: Doctor, that was an incomplete fracture, was it not?

A. It was not stated by the Roentgenologist. I have the x-ray if you want to look at it.

Mr. Lincoln: May I have just one question? May I offer these x-rays; that is, these x-rays that were taken at the time? These were the x-rays that were taken at the time, doctor? A. Yes, sir.

The Court: We'd better look at them while the doctor is here. Will you get our shadow box? I am very proud of that; I am the only man in the courthouse here that has one. I got it long before things like that came from the government and nobody has been able to get another one.

The Witness: I think you can see it without a shadow box.

The Court: Well.

The Witness: You can see it better with the shadow box. [63]

The Court: Where is it?

The Witness: Right here.

The Court: Oh, that is where the fracture is?

The Witness: That is right.

The Court: Well, let's not stop. We will get it later.

Mr. Lincoln: That is all.

The Clerk: Plaintiff's Exhibit 6.

The Court: It may be received in evidence.

Q. By Mr. Schell: May I see this report of Dr. Matzen you were referring to?

(Testimony of Leigh E. Sloan.)

A. Yes. This is a copy.

Q. Where is the original, doctor?

A. My secretary or my technician copies the report.

The Court: Put it here. Put it there, and connect it. It is all right now.

(Shadow box placed before witness.)

The Court: Doctor, will you——

The Witness: I think this is—this is it.

The Court: Speak loud enough for the record.

The Witness: This is the seat of injury here to the bone. You see the cortex broken on both sides, completely through there.

The Court: But didn't get across, is that the idea?

The Witness: This is the transverse process. The whole thing broke across there but it is held in place by [64] the ligaments around it. These show the ligaments that connect the bone in the back.

The Court: Is that likely to cause a calcium formation? Likely to immobilize?

The Witness: This may go together again. It is very slow to heal.

The Court: Slow to heal?

The Witness: Yes.

The Court: I see. All right. This show anything, then?

The Witness: No, this shows nothing here. That is the pelvis and the laterals don't show that.

(Testimony of Leigh E. Sloan.)

Q. By Mr. Schell: You have any laterals, doctor, in that area of this first lumbar?

A. You see, this shows that area up here.

Q. That is, so far as this particular picture is concerned, it is negative?

A. It is negative as far as that is concerned. This shows the whole thing. We took two views. If it don't show anything in one direction, it may in another.

Mr. Lincoln: The doctor has testified as to negative "R".

The Witness: That is "right"; "R" for the "right side."

Q. By Mr. Schell: Well, there is an "R" anywhere on there? [65]

A. The only way I can identify it, that is the right side.

Q. Then tell us, doctor, what is that a picture of so we may identify it?

A. This is a picture of the lumbar spine showing the pelvis.

Q. And referring particularly to the two points, which vertebra is that?

A. This is the twelfth thoracic vertebra.

Q. Twelfth? A. Yes.

Q. Also sometimes referred to as the first lumbar?

A. I don't know. I am not an orthopedist. I don't know. We have always spoken of it as the twelfth lumbar. I think he spoke of that area. No,

(Testimony of Leigh E. Sloan.)

it is the first lumbar segment there. It is the first; it is not the twelfth.

Q. In other words, it is the first lumbar; not the twelfth cervical?

A. The twelfth thoracic.

Q. There is no displacement on that, is there?

A. No, not that you can see from that direction. If you get back and the x-ray show directly through it, there might be some such or another, but I don't think that is a fact.

Q. And the other x-ray you took, what direction was that? In that same area? [66]

A. Well, that is the lateral; it is taken from the side.

Q. That shows nothing there?

A. That doesn't show anything.

Q. Doctor, was this the first time you had ever treated this patient?

A. No, no, I had treated him—oh, back in 1936, I think I saw him once before for a wen on the hand; that happened probably about 1932.

Q. Did you ever treat him for any back injury before?

A. He had—I think he lifted something once, I don't remember the details of it, but I believe I saw him just once for that condition, and I think he had some indigestion that didn't necessitate x-rays; that he took some alkalies for and that cleared up.

Q. I take it, doctor, from your testimony, you

(Testimony of Leigh E. Sloan.)

are directing more of your efforts now to internal medicine? A. Yes, sir.

Mr. Schell: I think that is all.

Mr. Lincoln: May I ask just one question, your Honor?

The Court: Yes.

Redirect Examination

Q. By Mr. Lincoln: Doctor, how much was the total charge which you made to Mr. Mateas for the treatments you gave him? [67]

A. I don't know. I think they got a bill. They could probably tell you that.

Q. Well, I will show you this. I show you a bill, doctor, and ask you if that refreshes your memory any as to the amount of your charges?

A. That is probably the bill. I don't know whether it is the items—I don't know whether it is itemized or not.

Q. This matter on the back is not in your handwriting at all, is it?

A. No, that is not in my handwriting. That has been put on since I rendered the bill.

Mr. Lincoln: We will offer this bill, your Honor.

The Court: How much is it?

Mr. Lincoln: $118.

Mr. Schell: Are you offering just the bill?

Mr. Lincoln: What is on the back has nothing to do with it and we are not offering it at all.

Mr. Schell: I noticed something on the back.

The Clerk: Exhibit 7.

(Testimony of Leigh E. Sloan.)

The Court: That is a reasonable charge for the treatment you rendered?

The Witness: Yes, sir. I don't make the charges. They make them in the office and they are all expenditures, your Honor.

Mr. Schell: That is all. [68]

Mr. Lincoln: That is all. You want these x-rays?

Mr. Schell: You might leave them.

The Court: Leave them with the clerk.

The Witness: Will they be returned as a part of my record?

The Court: Yes, except the one that was introduced in evidence, that cannot be withdrawn unless by stipulation.

Mr. Schell: We will stipulate when it is all through it may be withdrawn.

The Witness: Just a matter of record.

The Court: That is right.

Mr. Lincoln: Well, all right.

The Court: Mark the one that was introduced in evidence and then the other, mark it for identification.

The Witness: This is the only one you need?

The Court: That is right. The others may be marked for identification, if needed.

The Clerk: The one the doctor referred to will be 6, and the other——

The Court: 7 for identification.

The Clerk: No, I have the bill 7, so that will be 6-A for identification.

Mr. Lincoln: You will get them all back.

(Testimony of Leigh E. Sloan.)

Mr. Schell: Could we remove that shadow box?

The Court: Yes; take it down. I don't think we will need it. You won't have any other doctor witness? [69]

Mr. Lincoln: No, we have no more. I would like to recall Mrs. Mateas.

The Court: Come around.

JUNE MATEAS,

recalled as a witness on behalf of the plaintiff, having been heretofore duly sworn, testified as follows:

Direct Examination

Q. By Mr. Lincoln: Mrs. Mateas, just before recess I think that there was a question pending as to whether you could give us the names of some of the mules who were on this particular trip. Do you remember them?

A: Well, I remember my own mule's name, and my husband's mule's name I remember.

Q. What were those?

A. My mule's name was "Ann" and his was "Chigger".

Q. Between the time of this injury to your husband and up to the present time has he suffered any other injury? A. No.

Q. Did you have a conversation with Bob Ennis, the guide, after your husband was thrown from the mule? A. Yes.

(Testimony of June Mateas.)

Q. And where did that conversation take place?

A. That conversation took place on the trail, right [70] beside my husband; we were kneeling there looking at him.

Mr. Schell: Just a moment. Let's take this a little at a time.

Mr. Lincoln: You are quite right, Mr. Schell.

Q. By Mr. Lincoln: Was there anybody else present at that time except your husband and Bob Ennis and yourself?

A. I don't remember. There could have been another gentleman there, but——

Q. Let's get at it perhaps in another way. Were there some other ladies in the party?

A. Yes.

Q. I don't mean at this particular moment but I mean in the party going down.

A. Yes, sir.

Q. And do you remember whether or not those ladies went somewhere else after the accident?

A. Well, I don't remember where they went.

Q. Well, did they go somewhere?

A. Yes, they went somewhere.

Q. But you don't know where? And at the time this conversation took place were any of those ladies participating in it?

A. That I don't remember.

Q. All right. Now, was this conversation in relation to this particular mule which your husband had been riding? A. Yes. [71]

Q. What did Mr. Ennis say while you and your

(Testimony of June Mateas.)

husband were there, if anything? Tell us, please, anything as nearly as you can—just a minute——

Mr. Schell: To which we object, if the court please; that would be pure hearsay, anything that occurred afterwards, not a part of the res gestae; no showing this man was in any managerial capacity, or had *anything* authority to make any statement subsequent to the accident, and no showing it would be a part of the res gestae.

The Court: I am familiar with the rule which says an employee cannot make any admissions in matters of this character afterwards, but if they are close enough to the time as to explain at the time, they are binding, as I understand it.

Mr. Schell: May I ask the witness?

The Court: When a narrative of past events. If you want to examine him on——

Mr. Schell: If I may, please.

The Court: —how close they are to the happening of the accident, I will let you do that.

Mr. Lincoln: Before that, may I suggest to your Honor the thought which I have in this connection? Naturally, as I take it, the only persons who have any knowledge of the mule, and its antecedents, or its past experiences of the record, are those persons who were in the employ of the Harvey Company. Certainly we could not possibly know [72] anything about the mule, or its proclivities, if it had any, and the only way, therefore, by which we would be able to present to this court what those persons knew.

(Testimony of June Mateas.)

The Court: Of course, you plead the other way. Your pleading is this mule never carried persons.

Mr. Lincoln: All right.

The Court: In fact, you are going to show he is a balky mule with persons; so you will have to amend your pleadings to conform to your proof, if he is balky.

Mr. Lincoln: I expect to prove just exactly what I have alleged in the complaint, but I have to prove it, of necessity, I respectfully submit, by persons who knew and not by ours.

The Court: Of course, nevertheless, the rule does apply that if it is a narrative of past events it is not competent. You are familiar with that rule, because an employee who is like a driver of a vehicle, or driver of a street car, cannot bind the company by any statement unless it is right at or about the time. He cannot relate other things.

Mr. Lincoln: No, sir, that is quite true, but we submit that in this particular instance, and other instances, which I hope to be able to present, these persons could show, and the only persons who could show, what this mule had done at past times.

The Court: Well, I think we are talking at cross [73] purposes, what you are capable of proving and the rules of evidence which limit the declaration by which an employee can bind his employer. That is all. All right, you may examine her on voir dire.

(Testimony of June Mateas.)

Q. By Mr. Schell: How long after this accident did this conversation take place?

Mr. Lincoln: Objected to as immaterial.

The Court: Overruled.

Mr. Schell: You may answer.

The Witness: What was the question again, please?

Q. How long after the accident did this conversation with Mr. Ennis take place?

A. Well, you want approximately the time?

Q. Yes.

A. Well, about five or ten minutes.

Q. It might have been as long as fifteen?

A. Well, I don't know. I am just giving an approximate amount.

Q. Had the other people left the scene of the accident before the conversation took place? [74]

Mr. Lincoln: The same objection. May I have the same objection to all this line of examination, your Honor?

The Court: Overruled. You may answer.

The Witness: Had they left, did you say?

Mr. Schell: Yes.

A. That I cannot say. I don't remember whether they had left or not. I was upset. I remember that, if you are interested, I was kneeling talking to Bob.

Q. By Mr. Schell: I am interested just in the question.

The Court: In fixing the time.

(Testimony of June Mateas.)

The Witness: I cannot give any definite statement on time, Mr. Schell.

Q. By Mr. Schell: In other words, it was some time after the accident but you can't tell just exactly just when; is that right?

A. No, I cannot.

Mr. Schell: That is all.

The Witness: It was just right after.

The Court: All right. Go ahead.

Q. By Mr. Lincoln: What was the conversation?

Mr. Schell: I object, no sufficient foundation laid to show this is a part of the res gestae.

The Court: Oh, yes, I will overrule the objection. Go ahead. you may answer.

Q. By Mr. Lincoln: Which you had with Mr. Ennis and your husband concerning the mule. [75]

A. Oh, well, I was kneeling there and Bob was kneeling beside me there trying to make him a little comfortable, and Bob said that was the first time the mule had been down the trail. That was the general gist of the conversation.

The Court: All right.

Mr. Lincoln: Your witness.

Cross Examination

Q. By Mr. Schell: You had ridden from the rim of the Canyon up there, south rim, down to Indian Gardens; is that right?

A. That is right.

(Testimony of June Mateas.)

Q. And then after you got to Indian Gardens you stopped for lunch? A. Yes.

Q. Could you tell us approximately how long it took you from the rim of the Canyon down to Indian Gardens? A. I cannot now.

Q. I mean was it a matter of minutes or hours?

A. It was a matter of hours.

Q. A matter of two or three hours, something like that? A. Yes, I would say so.

Q. Now, you left around 11:00 in the morning, sometime around 11:00 o'clock? A. Yes.

Q. And would you say it was 1:00 or 1:30 when you arrived at Indian Gardens? [76]

A. It could have been 1:00 or 1:30.

Q. Well, you say "could have been," I mean is that approximately?

A. That is an approximate figure, yes.

Q. And then how long after you left Indian Gardens did you ride before this accident happened?

A. Well, it was approximately a half to an hour, a half hour to an hour.

Q. A half an hour to an hour? A. Yes.

Q. In other words, from the time you had mounted again at Indian Gardens until the accident was somewhere between a half hour and an hour? A. Yes.

Q. And you had been riding more or less continuously all that time? A. Yes, that is right.

Q. Hadn't made any stops to dismount in the interim? A. No.

(Testimony of June Mateas.)

Q. And you say the mule that your husband rode was "Chigger"? A. That is right.

Mr. Schell: I think that is all, your Honor.

Mr. Lincoln: There is one question which I may have if I am permitted, your Honor?

The Court: Go ahead. [77]

Q. By Mr. Lincoln: Do you know, or did you, at that time know or meet a guide by the name of "Bob"? A. "Bob"?

Q. Yes.

A. He was our guide—Bob Ennis.

Q. Or who was "Bill"?

A. I know his name to be that now.

Q. You did meet him, did you?

A. At Indian Gardens.

Q. And what was his position with relation to your party?

Mr. Schell: Just a moment. If I understand I think it would call for a conclusion of the witness, what his position was.

The Court: I don't know what he did. Let's see. Go ahead. You may state what was he doing.

Q. By Mr. Lincoln: What was he doing?

A. He was a guide.

Q. Of your party? A. Of another party.

Q. Of another party? A. Yes.

The Court: Oh, of another party?

The Witness: Yes.

Q. By Mr. Lincoln: Did you have any conversation with him in relation to this mule that your husband was riding? [78] A. At which time?

(Testimony of June Mateas.)

Q. Any time. A. At any time?

Q. Yes. A. Yes, I did.

Q And when? A. In the hospital.

Q. How long after the injury?

A. It might—about a week and a half.

Q. Was anybody else present at that time?

A. No, just my husband and myself.

Q. What was the conversation?

Mr. Schell: Just a moment. To which we object.

The Court: Oh, that is clearly outside of any rule. That is clearly outside of any rule. It is not competent, an admission of an employee as to past events, you can prove almost anything that way. The objection will be sustained.

Mr. Lincoln: Will your Honor bear with me for a moment, please, sir? Will your Honor say——

The Court: I am not saying. I am just ruling.

Mr. Lincoln: I understand, sir.

The Court: I am governed by the rules of evidence, and this case comes to us from the State courts and we are governed by the rules of evidence of the State courts, and you cannot prove negligence by an admission of somebody else, an employee, made a long time afterwards. I allowed the [79] other because it was so close to the event as to be a part of the res gestae. You couldn't, if you had a street car accident, you could not produce some employee and by virtue of a statement made three months afterwards, or two weeks afterwards, or a

(Testimony of June Mateas.)

week, wouldn't prove something was wrong with the street car at that time, or the way she was treated, and that is exactly the rule by which you are governed. The manner of proof is not an argument. I know what your argument is going to be, you have another way of proving it, that is not an argument. The manner of proof does not create law. You cannot prove negligence on the part of an employer by a statement of somebody long after the event.

Mr. Lincoln: We now offer to prove by this witness that in this particular conversation with this man named Bill, who was one of the guides employed by the Harvey Company on this Bright Angel Trail at the particular time and place which the witness has already testified to, this man stated to her that he knew this mule, and the the mule had always been fractious since he had been purchased by the Harvey Company to be used by the Harvey Company.

The Court: All right.

Mr. Lincoln: That is all.

Mr. Schell: I take it, we should for the purposes of the record, object to the offer of proof.

The Court: Yes.

Mr. Schell: As incompetent, irrelevant and immaterial, [80] and hearsay.

The Court: Objection sustained. The objection will be sustained.

Mr. Lincoln: That is all. Mrs. Rayle, come forward, please.

MRS. ALICE RAYLE,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name.

A. Mrs. Alice Rayle.

Direct Examination

By Mr. Lincoln:

Q. Mrs. Rayle, do you know Mrs. Mateas, who just testified on the stand here?

A. Yes, I do.

Q. And Mr. Mateas, her husband?

A. Yes, I do.

Q. Are you related to either of them?

A. No.

The Court: Speak louder, Madam, so we can all hear you.

By Mr. Lincoln:

Q. When did you first meet either of them?

A. The first time I saw them was when we were getting ready to get on our mules.

Q. Now, when was that?

A. At the corral getting ready to take the trip down. [81]

Q. In 1942? A. Yes.

Q. Have you been in the courtroom this morning? A. Yes.

Q. And heard the testimony which has been given? A. Yes.

Q. And you are referring to the trip of the

(Testimony of Mrs. Alice Rayle.)

Bright Angel Trail at which Mr. Mateas was injured; is that right? A. That is right.

Q. You have seen this photograph of the persons in the party, have you, which was taken at the time? A. Yes, I have.

Q. And you are among that party?

A. I am.

Q. Do you remember the particular place where Mr. Mateas was thrown, from the mule?

A. Well, I remember the occasion; I don't know what you mean by particular place, except it being the trail.

Q. You remember the place with reference to, for example, Indian Gardens, whether above or below Indian Gardens? A. Below.

Q. And do you remember how long after you had left Indian Gardens that this accident took place?

A. No, not exactly. I know it was around 3:00 o'clock.

Q. Well, after the accident where did you go?

[82]

A. We went down to a little river *is* a place and stayed there for a couple of hours until another guide came.

Q. Do you know the name of this other guide?

A. His name is "Jerry."

Q. He was the guide of some other trail party?

A. Some other party, yes.

Q. Did you have any conversation with him

(Testimony of Mrs. Alice Rayle.)

either there or elsewhere with relation to this particular mule?

A. Not that I know of. I don't recall any.

Q. Did you meet at that time a guide by the name of "Bob"?

A. "Bob" was our guide.

Q. He was your guide? A. Yes.

Q. Well, did you have any conversation with him at that time, or at some other time, in relation to this mule? A. Yes.

Q. And at what time was that?

A. That was the following day, coming back.

Q. Had you been—did you go as far as Phantom Ranch this first day? A. Yes.

Q. When you were at Phantom Ranch did you write any report or record of this happening?

A. Yes, sir.

Q. (Addressed to Mr. Schell): Do you have that, Mr. Schell? [83]

Mr. Schell: The only thing I have, I don't have the original; I have been trying to locate it, but I have a copy, if you wish it you may have it.

The Witness: I had practically nothing to write. The conversation you mention——

Mr. Lincoln: Wait a minute.

The Witness: ——happened the next day.

By Mr. Lincoln:

Q. Now, this conversation which we are referring to, where did that take place?

A. That was the next day returning on the trip.

(Testimony of Mrs. Alice Rayle.)

Q. On the trail? Was anybody present except you and Bob?

A. Well, the rest of the party, of course, had been——

Q. I mean engaged in this conversation.

A. No.

Q. What did he say?

Mr. Schell: To which we object as not a part of the res gestae. It is the following day.

The Court: I don't know of any rule, Mr. Lincoln,—if you will point me to any case in California that allows this, I will be glad to listen to you, but it is clearly forbidden by the law of California to prove negligence by statements of employees made long after the event. If you know any other rule I would be glad to listen to you, and show me or tell me the book, and I will get it.

Mr. Lincoln: I am sorry, I don't have the book or page [84] which will be of assistance to me.

The Court: Well, give me a statement somewhere. Have you got any law book?

Mr. Lincoln: No, sir, I haven't a thing in the world.

The Court: The law is the other way.

Mr. Lincoln: I have been mistaken in the law so many times, it is also possible I am in error this time, but I want to make such record as I may here.

The Court: It is not a question of making a record. I am always willing to learn. I am in my *seventeenth* year and I learn things every day. If there is something in the law or opinions on this

subject I am unfamiliar with, I would be glad to have you point it out to me. As it is the law, as I understand it, clearly states when it comes to proving negligence against an employer a statement of an employee is only admissible if it is made right at or about the incident. Any explanation of what took place by a narrative of past statements made later on are narrative past events, and are not binding upon the employer.

Mr. Lincoln: But your Honor cannot find the word "negligence" in my pleadings. I am basing this——

The Court: It is not.

Mr. Lincoln: I am basing this not on the negligence theory. Now, the case of Dam against Lake which, of course, your Honor is familiar with,——

The Court: Yes. [85]

Mr. Lincoln ——in that case they had two entirely separate causes of action; one for the breach of a warranty and the other one for negligence. It seems to me wise, and my feeling has been, predicated upon the theory of a breach of a warranty. Now, I respectfully submit that if I sell to you a piece of machinery, for example, which I warrant is fit for the purposes for which you intend to use it, and I can produce an employee who says, "I knew that particular piece of machinery was no good long before it left the place; I have been using that for years and the boss himself knew that it was no good," I submit that that is competent evidence.

The Court: Your case is still a case in tort, an action in tort, not an action on a contract. You see, a piece of machinery would be a different proposition, fitness for particular use, but here it is negligence, you see, it is still based on a tort; it is not—if this were an action, you see, brought before he had bought a mule and he was represented as gentle you see, and you brought an action, you might be able to prove that he was not gentle, was known not to be gentle, because it would be an atcion upon a contract. Here your action is still a tort but arising out of this contract that was made. It is still a tort and the measure of damages is the injury he sustained. Therefore, the rule which would apply to a sale of a piece of machinery that was defective does not apply in a case of [86] this character, but the rule would apply which applies to torts. You are suing here for failure of duty flowing from the contract.

Mr. Lincoln: Of course, I am sorry your Honor and I look at the matter differently.

The Court: Pardon?

Mr. Lincoln: I am sorry your Honor and I look at the matter differently, but I still think that I should be permitted to introduce these conversations as being the only possible way in the world that anybody can ever know anything about an animal; if the persons who take care of the animal are not entitled to tell what the animal's condition is, then it is very obvious that nobody in the world

could ever prove anything with regard to an injury sustained from an animal.

The Court: Oh, no, no. The Kersten case shows how that is proved. Let's get the case. It shows clearly how it was done. They produced the persons who had ridden the mule in the past and showed that he performed in a similar manner and that evidence was held admissible.

Mr. Lincoln: Of course, we can't prove that.

The Court: But this is merely an answer to your statement it is impossible to prove it.

Mr. Lincoln: In the 52nd Appellate (2d)—52 Second—Cal. (2d)—the Kersten case.

The Court: Let's have those old cases. [87]

Mr. Lincoln: I have that here. Your Honor has the Kersten case? That is on page 1.

Mr. Schell: Page 1?

The Court: In the Kersten case, you see, three persons were offered, they were witnesses that were produced that prior to the day of the accident had ridden a horse, and they testified that the horse was a spirited horse, and the court held that presented a factual case to the jury. It was also shown there that the defendant in the case refused to allow Dr. Kersten's daughter Alice to ride the horse on that ground. Now, I don't know about the Dam case.

Mr. Schell: That is 395, your Honor.

The Court: I don't think this throws any light. "We agree with the appellant that it is not always necessary"—I am reading from page 400 of this

Dam case—"We agree with the appellant that it is not necessary—always necessary for the appellee to prove actual acts of misbehavior on the part of the horse prior to the accident but, in some way, the appellee must prove such facts as would justify a jury in finding that at the time and place in question the horse was unsafe and unsuitable for the purposes for which it was hired."

I doubt, as a matter of fact, that on a strict contractual basis you could prove by a declaration of an employee made long after the particular event had occurred, that there was a defect in the particular piece of machinery, although it [88] may well be that there might be some justification there, because if a piece of machinery is broken and an employee had worked on it, he may be able to testify, but I can't see how you are going to prove a failure of warranty by statements made by an employee later on to the effect it was known to be a fractious horse.

Mr. Lincoln: Well, I grasped three words in the decision which your Honor read. The words "in some way" I respectfully submit that the testimony which I am seeking to introduce comes within the three words "in some way." That is to say——

The Court: But you see the main point though is this, we are still bound by the proposition that an employer—an employee, you see, cannot bind the employer except under certain circumstances. He can bind the employer by things done in the course of his emploment, by statements or declarations relating to the business for which he was hired.

Mr. Lincoln: I agree with your Honor perfectly and that comes precisely within the purview of what I am attempting to prove. These men were hired to take care of the mules. Mr. Harvey, if he were alive, or the corporation itself, had no personal knowledge of the peculiarities of these mules, but these men who handled the mules did; these men were acquainted with the mules.

The Court: That is not the point.

Mr. Lincoln: They were almost friends with the mules, [89] and they knew exactly what this mule was.

The Court: Other acts which will justify a declaration as to past events are not binding on an employer, except in very limited circumstances.

Mr. Lincoln: I think this is one of the limited circumstances.

The Court: I don't know. I will declare a recess and you can go into the library and look up the law, if you can find any law which says that you can prove a failure of duty by this character of evidence, by declarations made by an employee later on, either a week after an accident, which I have already excluded, or a day after the accident which concerns us now, I would be very glad to overrule myself and allow not only this evidence to go in, but reopen the case so as to allow you to include testimony given on the previous occasion, I mean which I have excluded; I would be very glad to do so and overrule myself. I know of no law, or principle of law, that warrants that, and while I refer to the

cases as negligence the rule is exactly the same as I conceive it, because the warranty is breached by the failure of a duty, and that is the duty to ascertain in advance, you see, the character of the horse, and to say that you would be in a position to maintain that these people had knowledge before this hiring was done of the mule.

Mr. Lincoln: Precisely what I am trying to prove. I say we shall show that these people did have knowledge of [90] this particular mule.

The Court: But you can't prove it by what this mule did.

Mr. Lincoln: I am proving it by their own knowledge.

The Court: While I declare a recess I will find you the law in a few minutes myself. It is your duty to come prepared on the matters of this character, if not a trial brief at least to have the law to sustain your position when you are confronted with this principle of law which is so well established. I will declare a recess. I will try to find the law on this subject.

(Short recess.)

The Court: Before you pursue the inquiry, I want to read into the record the result of my research, and after running through the cases I am more than ever satisfied that the ruling is correct, and that it is the general rule.

The rule is not limited only to cases based on negligence, but the ruling which prohibits admissions or declarations of an employee after events is grounded upon the doctrine of responsibility. Now,

it does not mean you could not produce an employee at this time, and in this court, who could testify that he knew at the time that this mule had particular qualities, or that certain events happened, but what the ruling is that you cannot prove the fact by declarations made by an employee subsequent to the event, because the employee has no authority to bind the employer by such statements. [91]

Now, I have gone through a long list of cases and I picked out four cases, and they are nearly forty years old, covering a stretch of forty years, to show the continuity of the principle, and the first case is the case of Beasley vs. San Jose Fruit Co., in 92 Cal. 388, decided in 1891, and that was an action brought by an employee against an employer for negligence, for injuries sustained through a fellow employee. That was, of course, the day before the present system of liability was established, which abolished the fellow servant rule.

In that case—I am reading the entire statement to show how broad the court's statement of law is, and this case is cited in the last case I have here from the 22nd Appellate (2d), showing there is a continuity in the rule——

"For the purpose of showing that Henning was careless and that his carelessness was known to defendant at the time he was put in charge of the elevator, it was testified on behalf of the plaintiff that on the evening of the day on which the accident occurred Wright, who, as the foreman of the defendant, had employed Henning, visited the plaintiff at his house and in a conversation with him

said, 'Mr. Henning had been a careless man before that and they knew it; he set their place on fire a few days before; that accidents had happened before with him and that the company ought not to have kept him as long as they did.'

"Testimony of what Wright had said to the plaintiff on [92] that evening after the accident was not competent to prove the fact that Henning was careless and didn't in any respect bind the defendant. The admissions of an agent not connected with the transaction to which they refer cannot bind his principal, even though made in explanation of an act previously by him while in the exercise of his agency. Much less can his opinion bind his principal with reference to a transaction with which he was not connected. The opinion of an agent based on past occurrences should never be received as an admission of his principal's, and this is doubly true when the agent was not a party to those occurrences.

"The declarations of an agent, or servant, do not, in general, bind the principal. To be admissible they must be in the nature of original, and not hearsay, evidence. They must constitute the fact to be proved and must not be a mere admission of some other fact," and so forth.

Now, we have a clear statement later on. Here is a case in the 171 Cal., Willard vs. Valley Gas & Fuel Co., and in that case the court applied it then to a case where the doctrine of res ipsa loquitur applied, and that is where the happening of the acci-

dent in itself was sufficient proof on the part of plaintiff, because it was an agency which the plaintiff controlled. It was an explosion which had occurred after the gas—an employee of the gas company had tinkered with the appliances. This is Willard vs. Valley Gas & Fuel Company. The court said on page 16—the [93] opinion was written by Judge Melvin, and concurred in by the whole court; reading from page 16, this is 171 Cal.:

"The court erred in admitting testimony of Mrs. Willard in relation to declarations of Mills made after the explosion that he had 'turned off the wrong thing', and so forth. This statement was made after the explosion and after the efforts of Mrs. Willard and Mr. Mills to put out the fire, but just how long afterwards does not appear. It was shown, however, that Mr. Mills had retired to the road, and then immediately making the statement he went away. The statement was not a part of the res gestae and should have been excluded. That defendant was materially injured by the admission of the testimony there can be no doubt."

Now, here is another case. The date of this case is 1915. It is another case—1932—Bodholdt vs. Garret 122 Cal. App., 556, at page 569. This applies with great cogency to this case because it was an action brought under a special statute which made counties and municipalities liable for personal injury resulting from defective condition of public property where the officers had knowledge of the defective condition. In other words, similar to this case where the cause of action lies in know-

ing the bad quality of the mule prior to the accident.

"One of the plaintiff's witnesses immediately after the accident inquired of an injured plaintiff as to his condition, and thereafter walked across the street to interview the [94] defendant Garret. By question and answer the witness elicited the information from Garret, the truck driver in the employ of the city, that the collision was due to a broken spring on the front portion of the truck.

"Appellants complain that the trial court erred in instructing the jury that this statement or admission of the driver was in no way binding upon the defendant, the City of Oakland. Statements of an employee not part of the res gestae and not made spontaneously, or as the result of excitement from the accident, are not binding upon the employer. While it is true that time is not the controlling element of the matter of res gestae, still the statements must be not only contemporaneous but voluntary and the result of excitement, and made before a person has time to calculate and consider the form and substance of the explanation.

"There is no evidence in this case to indicate that the particular statement was caused by excitement, and hence the ruling of the trial court cannot be disturbed.

"Appellant further contends that no objection was made by respondent to this evidence and that the court erred in striking the statement from the record. The court on its own motion, in the inter-

ests of justice, may exclude incompetent and inadmissible evidence."

I am not reading other transactions of the doctrine of res ipsa loquitur that applies, and that is not important. [95]

Now, here is a later case than that. In this case, dated May 13, 1938, Wills vs. Price, 26 Cal. App., (2d), 338, the opinion written by Judge Haines, concurred in by Judge Jennings and Judge Marks.

In that case that was an action where the doctrine of res ipsa loquitur applies, and that is that the linoleum had fallen off a rack and struck a customer on its premises. Of course, that is a situation that calls for the application of the doctrine of res ipsa loquitur. They tried to show that similar occurrences had occurred and the court had this to say:

"With respect to those matters we entertain no doubt"—wait a minute—yes—the court reads—here is reference to admitting evidence that the linoleum had in the same room toppled over and fallen on other occasions, both before and at the day of the accident, and also its refusal to allow Mrs. Wills, and her sister, Mrs. Willits, to testify to a conversaton that Pauline Thomas, an employee of the store, in which it is claimed the latter admitted knowing of such occurrences. The court said:

"With respect to these matters we entertain no doubt that it would be competent to admit evidence of previous accidents occurring under substantially

the same general circumstances as the one under in vestigation, both as tending to show the cause of the latter and if appellants were shown to have notice of them as tending to establish [96] negligence on their part."

And then they say, "The rule as to evidence of subsequent accidents is different. We are unable, however, to find from the record any instances in the present case of the rejection of testimony respecting such previous accidents, save only the court's refusal to allow Mrs. Wills and Mrs. Willits to testify to statements above referred to, claimed to have been made by Pauline Thomas. This proffered testimony on the part of Mrs. Wills and Mrs. Willits was, in our opinion, properly excluded."

And they say, "Because it does not appear"—I am not reading the entire paragraph——

"Even though Mrs. Thomas was an employee of the store that she had any connection with handling the linoleum or keeping it in order, or the room where it was handled," and so forth. But they add, "More than that, however, this statement on Mrs. Thomas' part, whatever they may have amounted to, were extrajudicial, and having occurred after the accident were no part of the res gestate, and that, therefore, mere hearsay," and here they advert to that case of Beasley vs. San Jose Fruit Company, from which I read, in the 92nd California; and Bodholdt vs. Garret, 122 Cal. 566.

So we see that the court has applied it to a variety of causes of action, both a case where the

duty was imposed to bring home to the municipality, or the officers of the municipality, knowledge of a defective condition of [97] equipment, and applied it to the case where the doctrine of res ipsa loquitur came into play, which means cases where the very occurrence of this accident is sufficient prima facie proof that the defendant is liable for it.

The collision between the railroad trains on the same track, because of the presumption that as the railroad is in sole control, the very happening of the accident is sufficient to throw the burden upon them to prove that it was not due to any negligence on their part. Then they have applied it to those cases and, of course, there are hundreds of cases. The Digest, which I consulted, had under paragraphs 283, 285 and 286, of the Chapter On Evidence, conservatively not probably 75, but I would say hundreds, that is the construction in conservatively 75 cases arising from accidents, automobile drivers, employees, and the others, and the theory, as I say, is derived from the relation of employer and employee, and the effect of the statement of an employee, to allow an employee to bind the employer by a subsequent statement, why, would lay the employer open to all sorts of dangers. A man might go to a bar and long after something happened, and under the influence of liquor, tell a lot of things. Before you could bind the employer you would have to, if you are going to bind the employer by that, why, you would establish a rule and a relationship which is not warranted by the cases. So I felt certain that the rule could not be

limited to just negligence, because [98] it is a rule of agency rather than a rule—than a rule limited to negligence because, although, of course, it has been more frequently invoked in negligence cases; there are cases even relating to statements as to the circumstances in which a contract was made where the circumstances were in dispute, and admissions of an employee made long after the events were held not to be binding upon the parties.

So while I say if you can bring these witnesses in and have them state they knew, of course, that is primary evidence, but you cannot bind the employer by declarations made either a day after, or a week and a half after, under the rule of evidence as I understand it; and, of course, under the new rules we are—we follow the rules of evidence of the State where we sit because Congress has not prescribed any rules of evidence in the Rules of Procedure, nor by any other Act, and while the rules say that the policy of liberality should follow, and we should rule in cases of doubt in favor of an admissibility, which is merely a prescriptive rule, or rules, and do not mean that the so well established principle which relates to hearsay should be disregarded, because if we did then, of course, if you are going to disregard the hearsay rule in an ordinary case then there is no rule of evidence; we are coming to the Continental system which obtains on the continent of Europe, which is so hard for us to understand, where everything is admissible both in a civil and a criminal action. You can [99] enter a French court, and a German court, or in a

Russian court, because they are not bound by the common law rules of evidence. You can tell what somebody's housemaid told somebody else's maid, and go away back into all sorts of ramifications and bring them before the court and have the court weigh them, but the rules of evidence which are established in the English-speaking courts have excluded hearsay, and they declare statements or declarations of an employee not made contemporaneously and as a part of the conditions in which he participated, but purely narrative of past things, are not binding on the employer. And in the light of that, why, I must exclude this testimony.

Mr. Lincoln: May I then, your Honor, make an offer of proof?

The Court: If you want to you may. I don't think it is necessary because the question you have asked, and your statements, clearly indicate the nature of the testimony you want to elicit, but if you want to, you may.

Mr. Lincoln: It was only just a very short conversation.

The Court: All right.

Mr. Lincoln: I think perhaps if the court will allow me, we offer to prove by this witness that the guide, Bob Ennis, told her on the particular day and occasion, which she has already referred to, that the particular mule which had been ridden by Mr. Mateas the day before, had not been down this particular trial, or had not been ridden by any passenger [100] that season. That is all.

Mr. Schell: To which also we object, your Honor, as being incompetent, irrelevant and immaterial; being purely hearsay and not part of the res gestae.

The Court: Well, I think also in addition to that, I think it is also immaterial because that is not an element in the proof of this case.

Mr. Lincoln: That is correct, your Honor.

The Court: Whether it has been completed or not is immaterial. It is not a fact the first time a mule had been ridden—we are not dealing with a horse that was not broken.

Mr. Lincoln: No, he said the first trip, that was the first trip that season. That doesn't mean anything, anyhow.

The Court: All right. However, I have made the ruling. I think, Mr. Lincoln, the ruling seems to follow the only way you can prove it. I went to all the trouble of putting in the record my reasons for overruling. Of course, I sustain the objection. All right.

Mr. Lincoln: I am going to try it another way. May I recall Mr. Ennis for a few more questions, your Honor?

The Court: All right.

Mr. Lncoln: Mr. Ennis, will you come forward again, please? [101]

EMMET MYRON ENNIS,

recalled.

Further Direct Examination

Q. By Mr. Lincoln: Mr. Ennis, in 1942, in June or July, was there one of the guides who took passengers down on these trips by the name of—with the first name of "Jerry"?

A. Jerry Butler.

Q. "Butler" was his last name? Is that right?

A. Yes, sir.

Q. Another one you remember by the name of "Bill", and, if so, what was his last name?

A. There was a blacksmith helper by the name of "Bill Basey" that occasionally taken people into the Canyon.

Q. That is, having the same position your son did when he went down with people?

A. No, he was a blacksmith's helper.

Q. I know, but did he ride down as a guide?

A. Occasionally, yes.

Q. Do you know—did you keep any record of the number of times he went into the Canyon, and what he did with people? A. No, I have not.

Q. Do you have any personal acquaintance with this particular mule that Mr. Mateas rode, presumably his name was "Chigger", that is, as far as I know?

A. My personal recollection or knowledge of——

Q. No, just answer my question with "yes" or "no", if you can tell us? [102] A. Yes.

Q. You do know? And how long had you known him before 1942, Mr. Ennis? A. '38.

(Testimony of Emmet Myron Ennis.)

Q. '38? Where had he been used between '38 and '42, if you know? Or do you know?

A. He was about—from 1938 and 1939 he was in the pack train, being packed and used as a guide mule. The packer rode him occasionally.

Q. Then after that?

A. 1940 he went into the "dude" string.

Q. On the Bright Angel Trail?

A. On the Bright Angel Trail.

Q. That particular year do you know if there were some college boys that rode him?

A. No, I don't.

Q. Do you know where Jerry Butler is now?

A. No, I don't know just where Jerry is at now.

Mr. Lincoln: That is all.

Mr. Schell: No questions. All right.

The Court: All right. Step down.

Mr. Lincoln: Mr. Bradley, please. [103]

JOHN BRADLEY,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Will you please state your name?

A. John Bradley.

Direct Examination

Q. By Mr. Lincoln: Mr. Bradley, are you an employee of the Harvey Company?

A. Yes, sir.

(Testimony of John Bradley.)

Q. And have been for how long?

A. Since 1933, July 13th, I believe.

Q. Now, what particular duties do you perform at the present time, or in 1942, or before?

A. Well, for the past—going on eight years I have been trail foreman; that is, in charge of the guides and of the stock in the trail trips.

Q. As a part of your duties are you also acquainted with the mules?

A. Absolutely; yes, sir.

Q. Do you know this particular mule called "Chigger" that was supposed to have been ridden by Mr. Mateas? A. Yes, sir.

Q. By the way, how do you spell that name?

A. Chigger?

Q. Yes. A. C-h-i-g-g-e-r. [104]

Q. Thank you. Did you know this mule when it first came onto the place? A. Yes, sir.

Q. When it was first brought there by the Harvey Company? A. Yes, sir.

Q. Did you have charge of it from that time on?

A. Yes, sir.

Q. Mr. Bradley, as Mr. Ennis has just testified, for the first year or so it was used on the pack train; that is correct, is it?

A. That is correct.

Q. Until '40? And then in 1940 you used it on the "dude" trains?

A. Yes, sir, it began its "dude" training in the year 1940.

(Testimony of John Bradley.)

Q. Did this mule continue on these "dude" trains from 1940 all the way up to June, 1942?

A. That is right.

Q. Didn't put it back on the pack trains at all?

A. Well, I wouldn't say definitely we didn't at all because we alternate them depending on the season and what stock we might have there, and depending on how much pack and how much guest work we have.

Q. So do you keep any record of the trips that any particular mule takes?

A. No, not any individual. [105]

Q. Whether pack trains or "dude" trains?

A. No, not on any individual mule.

Q. Do you know of any occasion along in the year perhaps 1940 or '41 in which this particular mule had been ridden by some college boys or some high school boys?

A. No, I don't remember any particular occasion but it is very possible that it was.

Q. And they stuck spurs into him and made him buck?

A. No, absolutely not, because that is my job to see no one mounts with spurs. Even the guides never ride with spurs.

Q. Did they do—or they had done anything to him to cause him to buck?

A. I never had any report of that kind.

Q. Did this fellow Jerry ever tell you anything of that kind? A. No, sir.

Mr. Schell: Just a minute.

(Testimony of John Bradley.)

Mr. Lincoln: You are safe. He says no.

Q. By Mr. Lincoln: Did anybody ever report to you that this mule had bucked before the summer of 1942?

A. No, sir, that is the first time it was ever reported.

Q. Do you know whether or not this particular mule had carried any passengers in the summer of 1942 before the 17th of June?

A. No, it hadn't, not in 1942. [106]

Q. That is what I mean. And where had the mule been before the summer of 1942?

A. He had spent the winter months at our ranch south of the Canyon, Del Rio Ranch, that is the company's pasture.

Q. Just in a pasture?

A. Yes, it is a ranch—agriculture and pasture.

Q. So that this particular trip was his first trip down? A. That year, yes.

Q. That year? A. Yes.

Mr. Lincoln: That is all.

Mr. Schell: That is all.

The Court: Step down.

Mr. Lincoln: Mrs. Vogel, please come forward.

MRS. ELLA W. VOGEL,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Mrs. Ella W. Vogel.

Direct Examination

Q. By Mr. Lincoln: You are Mrs. Ella W. Vogel? A. Yes, sir.

Mr. Lincoln: I am presenting, your Honor, and if the court will permit me, this particular testimony perhaps against your Honor's ruling, but simply for the purpose of [107] making such record as might be of some value, and I am not certain whether in view of your Honor's ruling it would be of any value, nevertheless I would like permission to present it.

Q. By Mr. Lincoln: Mrs. Vogel, were you one of the parties who was on this trip in which Mr. Mateas was injured? A. I was.

Q. Are you related to either Mr. and Mrs. Mateas? A. No.

Q. In any way? A. No.

Q. Did you ever see them before you met them on this particular trip? A. No.

Q. You are in that picture, are you, Mrs. Vogel, somewhere? A. I am.

The Court: Yes, the third person right there.

The Witness: The second.

The Court: Right there?

The Witness: Yes, that is me.

The Court: All right.

(Testimony of Mrs. Ella W. Vogel.)

Q. By Mr. Lincoln: After Mr. Mateas was injured did you remain at the place where he was thrown off?

A. For about 20 or 30 minutes.

Q. And during that time did you have any conversation [108] with Bob Ennis, the guide?

A. Well, we were all talking—I don't know—I don't know as I had any particular conversation with him.

Q. All right.

A. We were all talking back and forth.

Q. You went from there where?

A. We went from there—Bob took us down to Indian—to the river house.

Q. And there did you meet a guide by the name of Jerry, or Butler, I believe the correct name is?

A. Well, not until later.

Q. When was it you met him?

A. I believe they phoned him; I believe he was at Phantom Ranch and they phoned him to come down and meet us and take us to Phantom Ranch?

Q. Anyway, you met him? When was it you first met him? A. About 5:00 o'clock.

Q. That same day? A. Yes.

Q. Did you have any conversation with him then with regard to this particular mule?

A. No.

Q. All right. Did you have a conversation with anybody with regard to this particular mule?

A. I had a conversation with Jerry later in the evening.

(Testimony of Mrs. Ella W. Vogel.)

Q. Oh, I see. Well, I am sorry I missed my time then. [109] By "later in the evening" do you mean about what time?

A. Well, it was after 10:00 o'clock in the evening because we all went in swimming and I had been in swimming and was sitting at the side of the pool talking to these people.

Q. Was anybody else participating in that conversation?

A. Yes, there were two school teachers.

Q. Do you know their names? A. No.

Q. Strangers to you, were they? A. Yes.

Q. I see. Now, don't answer this question, please, until Mr. Schell has an opportunity to object to it, and his Honor has an opportunity to rule on it. What conversation did you have at that time with Jerry, the guide, concerning this mule?

Mr. Schell: To which we object; it is incompetent, irrelevant and immaterial.

The Court: Yes.

Mr. Schell: And hearsay, and not a part of the res gestae.

The Court: Yes. Objection sustained.

Mr. Lincoln: We now offer to prove by this witness that at this particular time and place this guide, Jerry Butler, stated to this witness that he knew this particular mule, and that the summer before the mule had been ridden by a [110] bunch of college boys who had spurred the mule and got him to bucking, and thereby had ruined the mule; that in consequence it was no further—they couldn't

(Testimony of Mrs. Ella W. Vogel.)

use the mule upon this trail, but they had taken it over to the north rim on a pack train, and had brought it back earlier this year, and this was the first trip which the mule had made with any passengers this season.

Mr. Schell: To which offer of proof we object as incompetent, irrelevant and immaterial, and hearsay, and not tending to prove or disprove any issue in this case.

The Court: Well, on the basis of the rulings previously made, and for the reasons previously stated in the record, the objection is sustained.

Q. By Mr. Lincoln: Did you overhear a conversation, Mrs. Vogel, between Mrs. Mateas and Bob Ennis at the scene of the accident, shortly after the accident?

A. I may have but I don't recall it.

Q. Don't remember it? A. No.

Mr. Lincoln: All right. That is all.

Mr. Schell: No questions.

The Court: All right.

Mr. Lincoln: I am sorry, your Honor, but that seems to be all we have.

The Court: Well, all right. Do you rest?

Mr. Schell: Do you rest? [111]

Mr. Lincoln: We have to.

Mr. Schell: We move for a non-suit and make a motion to dismiss this action, no proof of any breach of any warranty that the mule was of a not fit and proper character. In other words, there is no evidence here showing either negligence or any

breach of warranty on which a possible recovery could be had; and we submit that all of the testimony shows, and that all the testimony does show, is that on this particular ride the mule bucked when he—after he had been out four or five hours, and he bucks and the plaintiff fell off, and that is the sum total of anything and is certainly no proof of any breach of warranty, or negligence, or failure to comply with the statute; and, furthermore, the allegations in the complaint are that this mule had never been ridden before and this was his first trip; he had always been used as a pack mule for times before, and plaintiff's affirmative proof shows the mule had been ridden by the so-called "dude" for at least two years prior to the happening of this accident.

The Court: All right. Mr. Lincoln, you want——

Mr. Lincoln: Under your Honor's ruling I have no answer to that. I think if there is any question as to the proof, however, we should be permitted to amend to conform to the proof, in that it makes no particular difference perhaps in the final analysis; any slight question as to whether the mule had been ridden this year, or whether for the first time, [112] or whether it had been ridden this year on this trip for the first time, I don't know that it makes any difference in so far as our proof or plaintiff's is concerned.

The Court: Gentlemen, ordinarily when I try a case without a jury I am rather—I am rather re-

(Testimony of Mrs. Ella W. Vogel.)

luctant to grant a dismissal; although, of course, as you understand, under our new rules a dismissal if upon the ground that the plaintiff has not shown any right to relief at the conclusion of his case, is an adjudication on the merits.

I am always reluctant to do that despite the fact that in our Federal Courts we are not bound by the scintilla of evidence rule which the Supreme Court of California has promulgated in many cases, which makes it almost impossible to ever sustain a nonsuit, unless there is an absolute failure of proof, as it were. We have never followed that, but the rule we say is if there is any substantial evidence to—that there must be substantial evidence before the court will put a defendant upon his proof whether the case is tried by the court alone, sitting without the jury, or with the jury, and if there were any kind of an inference that could be drawn from this record, I would put on the proof, I would put the defendant on his proof so as to decide the matter upon the basis of the entire story as narrated to me by all of the parties concerned, but it would be just a waste of your time, and my time, because the record absolutely shows no basis for liability. [113]

The evidence elicited, or sought to be elicited through declarations, is already in the record by testimony of witnesses produced by Mr. Lincoln, whom he called as his witnesses and employees of the company, who stated positively that this was not the first time that the mule had carried passengers; it was the first trip that year, but I can't say, with

all that, that that is the basis of liability. The basis of liability is the one set forth in Paragraph 9 of the Complaint, and that is that defendants knew, or should have known, that the mule was not at all suitable, or fit to be used for the purpose for which it was provided, and was not a safe mule to be ridden in such place under such circumstances and conditions, and by a person wholly unfamiliar with riding either horse or mule.

That is the basis of liability and there is no testimony whatsoever that anybody knew of any trouble that this mule had. Of course, the lone declarations which were offered might, to some degree, have substantiated this, but I am so satisfied on the basis of the law as I find it that they were inadmissible, that I have in front of me a record which shows just exactly that this mule just bucked after he had been ridden by the same person for several hours.

Had the buck thrown his rider when the trip first began, as soon as the rider got on him, we might have said, "Nice mules should not behave like that," so following the doctrine of res ipsa loquitur, or something like that, so that there [114] is no escape from the conclusion that the plaintiff has failed to show any facts to which would entitle him to relief.

As much as one may regret the fact that somebody is injured through apparently no fault of his own, ultimately we cannot compensate a person for injuries unless it be shown that they were caused by the neglect of a duty which somebody else owed them, and there is no such in this record.

The motion to dismiss will, therefore, be granted.

Mr. Lincoln: Very well.

The Court: All right. Ten o'clock tomorrow morning.

[Endorsed]: Filed April 17, 1944. [115]

[Endorsed]: No. 10783. United States Circuit Court of Appeals for the Ninth Circuit. Elmer H. Mateas, Appellant, vs. Fred Harvey, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed May 27, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10,783

ELMER H. MATEAS,

Appellant,

vs.

FRED HARVEY, a corporation,

Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY UPON APPEAL

To the Appellee Above Name and to Its Attorneys, Messrs. Schell & Delamer.

You and each of you are hereby notified that the above named Appellants intends to rely upon the following points upon his appeal from the judgment entered in favor of the Appellee in the above entitled action by the District Court of the United States for the Southern District of California, Central Division, to wit:

(1) That the conversations between Bob Ennis and Mrs. June Mateas; and between Bob Ennis and Mrs. Alice Rayle; and between Mrs. Ella W. Vogel and Jerry (or) Butler, should have been received in evidence.

(2) That the objections to the offers of proof of the above respective conversations should not have been sustained.

(3) That by reason of the fact that the Appellee maintains several strings of mules over a period of many years for the purpose of carrying supplies and excursionists, up and down various trails to and from the south rim of the Grand Canyon, constitute such pack trains public carriers.

(4) That by reason of the circumstances set out in paragraph *111* hereof, the Appellee was an insurer of the safety of all persons carried by said mules on such excursions.

(5) That there was an actual or implied *warantee* given by Appellee to Appellant when Appellant purchased his ticket for the excursion, and when he read the advertisement and relied upon it.

(6) That there was a breach of such *warantee* which was brought to the attention of Appellee when the mule ridden by Appellant was skiddish or fractious on the trail, and when Appellant changed mules.

(6) That the unreliability of the mule's disposition was twice brought to the attention of Appellee before the time of the injury.

(7) That when Appellee would not permit Appellant to change mules, Appellee became responsible for the results which followed.

(8) That when the proprietor of an excursion trip such as this holds out to the excursionist that the apparatus, or animals are safe, and an excursionist *if* thereafter injured without fault on his part, the owner is liable in damages for said injury.

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

You are hereby notified that the above named appellant desires to have printed as the record on appeal the entire record as certified by the Clerk of the District Court of the United States in and for the Southern District of California, Southern Division.

WALTER GOULD LINCOLN,
Attorney for Appellant.

(Affidavit of Service by Mail.)

[Endorsed]: Filed June 15, 1944. Paul P. O'Brien, Clerk.